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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 33

WALTER E. WASHINGTON, *et al.*,

Appellants,

v.

MINNIE HARRELL, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1134

WALTER E. WASHINGTON, *et al.*,

Appellants,

v.

MINNIE HARRELL, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

Opinions Below

The opinions of the district court (A. 56-71, 71-87) are reported at 279 F.Supp. 22.[1]

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[1] The opinion reported at 279 F.Supp. 22 is captioned *Harrell, et al.* v. *Tobriner, et al.* After the opinion was filed, the parties moved, pursuant to Rule 25 (d)(1), Federal Rules of Civil Procedure, to substitute as party defendant Walter E. Washington for Walter N. Tobriner. The motion was granted in an order filed on November 28, 1967.

Jurisdiction

The decree of the three-judge district court declaring unconstitutional District of Columbia Code, §§3-203(a) and (b) and District of Columbia Department of Public Welfare Handbook of Public Assistance, EL 9.1, III, B, 3, and permanently enjoining their enforcement was entered on November 26, 1967. Notices of appeal were filed on December 22, 1967, and probable jursdiction was noted on March 4, 1968. The jurisdiction of this Court is conferred by 28 U.S.C. 1253 which provides for direct appeals from decisions of three-judge district courts.

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the Constitution of the United States provides in pertinent part that:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

D. C. Code, §3-203, provides in pertinent part that:

> Public assistance shall be awarded to or on behalf of any needy individual who either (a) has resided in the District for one year immediately preceding the date of filing his application for such assistance; or (b) who was born within one year immediately preceding the application for such aid, if the parent or other relative with whom the child is living has resided in the District for one year immediately preceding the birth; . . . .

Question Presented

Whether the provisions of D. C. Code, §3-203 which preclude the awarding of public assistance to persons who have not resided in the District of Columbia for one year immediately preceding the date of filing an application for assistance violate the Constitution of the United States.

Statement

A. The Pleadings and Procedure

These proceedings were commenced on June 12, 1967, when appellee Minnie Harrell[2] filed a complaint[3] in the United States District Court for the District of Columbia requesting that appellants be permanently enjoined from enforcing the provisions of the District of Columbia Code, §3-203. That statute provides that a person must be a resident of the District of Columbia for one year as a condition for applying for or obtaining Aid to Families with Dependent Children (AFDC), Aid to the Blind (AB), Aid to Permanently and Totally Disabled (APTD) or General Public Assistance (GPA).[4] The complaint alleged that to

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[2] On April 2, 1968, Mrs. Harrell died. On April 5, 1968, counsel for appellees filed in this Court a paper entitled "A Suggestion of Death and Motion to List the Name of Clay Mae Legrant in Place of the Name of Minnie Harrell in the Caption of the Above-Entitled Case".

[3] An amended complaint was filed on August 1, 1967 (A. 4).

[4] The requirement in D.C. Code, §3-203, that a person shall not be eligible for Old Age Assistance (OAA) unless he has resided in the District of Columbia for five years or more within the nine years immediately preceding the application for such assistance and has resided continuously in the District for one year immediately preceding the application, is not involved in this litigation. A similar

classify needy residents of the District of Columbia and their children on the basis of whether they have lived in the District more than one year, and to refuse to process the applications of those who have lived here less than one year solely for that reason is to classify arbitrarily in violation of equal protection of the laws guaranteed by the Fifth Amendment (A. 10). On June 20, 1967, and July 7, 1967, appellees Barley and Brown, respectively, filed complaints requesting similar relief (A. 18, 32). In all three cases appellees requested preliminary injunctions (A. 1, 15, 29).

On July 26, 1967, an order was entered consolidating the *Barley* and *Brown* cases with the *Harrell* case for all future action. Pursuant to a request for the appointment of a three judge district court, the Chief Judge of the Court of Appeals designated the judges to serve on that court on July 31, 1967. Following the filing of appellants' motion to dismiss or for summary judgment (A. 54) and appellees' counter-motion for summary judgment (A. 55), a hearing was held on September 7, 1967.[5] On September 11, 1967, the court below enjoined appellants *pendente lite* from denying public assistance to appellees because of their failure to meet the one-year durational residence requirement (A. 50).[6]

OAA residence requirement of the State of Arizona is currently under attack in *Porter* v. *Graham*, No. Civ.-2348 Tucson (D. Ariz. 1968). An order preliminarily enjoining enforcement of section 46-252 of the Arizona Revised Statutes (the OAA provision) was entered on January 24, 1968.

[5] On August 21, 1967, the motion of appellee Clay Mae Legrant for leave to intervene as a party plaintiff in the *Harrell* and *Brown* cases was granted. The intervenor's complaint (A. 42) was filed on September 15, 1967.

[6] On October 16, 1967, the court below entered an order permitting the suits to be maintained as class actions (A. 3).

In an opinion entered on November 8, 1967, the court below ruled unconstitutional the durational residence requirement and ordered the parties to seek agreement on the form of judgment (A. 56). The decree was entered on November 28, 1967 (A. 88) and a notice of appeal to this Court was filed on December 22, 1967.

B. The Appellees

1. *Minnie Harrell*

Before moving to the District of Columbia with her three children in September 1966, appellee Harrell resided in Suffolk County, New York (A. 7). She had been receiving AFDC on behalf of her three children since being separated from her husband in April 1966 (A. 7). Becoming ill with cancer, she decided to come to Washington so that in case of hospitalization her children could be cared for by her brother and sister, both of whom live in Washington.[7]

In December 1966, Mrs. Harrell was informally advised by the District of Columbia Department of Public Welfare that she and her children would be ineligible for assistance until they had lived in Washington for one continuous year (A. 8). In May 1967, she formally applied for public assistance and received a written rejection on the ground

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[7] See appellee Harrell's Affidavit in Support of Motion for Preliminary Injunction, which is part of the original record in this Court. Mrs. Harrell stated:

> My family has always been close, and I knew that my brother, Mr. George Lassiter, and my sister, Mrs. Erma Nowell, who both live in Washington, D.C., would help me care for my children. I also thought I might be able to make a better life for myself and my children in Washington. That is why I came to Washington, D.C., in September of 1966. I have stayed here ever since that date and have no desire to return to New York. I regard Washington, D.C., as my home, because my children and I need to be together with my family very much. *Id.* at 1-2.

that her family did not meet the durational residence requirement (A. 8).

2. *Vera M. Barley*

Appellee Barley first resided in the District of Columbia in 1935 (A. 21). After an absence of several years she returned to Washington in March 1941, at which time she was suffering from mental illness (A. 21). A month later, she was committed by court order to Saint Elizabeth's Hospital where she remained continuously until the decision by the court below (A. 21).

Since 1965, Mrs. Barley has been deemed competent[9] and has desired to live in the District of Columbia in a foster care home, a plan advised by her doctors (A. 21).[9] Therefore, in January 1967, officials at Saint Elizabeth's Hospital referred Mrs. Barley to the Department of Public Welfare for the purpose of establishing her eligibility for public assistance (A. 22). The goal of the hospital was to obtain financial support for her from the Department of Public Welfare so that she could be placed in a foster care home (A. 22).[10] The application was denied in February 1967,

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[9] See D.C. Code, §21-564(b).

[9] In an Affidavit in Support of Motion for Preliminary Injunction, which is a part of the original record in this Court, Mrs. Barley stated:

> I have lived here for the last 26 years. I wish to remain here. I do not regard any other state as my home. I have no property elsewhere, and my relatives in California are unable to take care of me. For the last few years I have never thought I would like to live elsewhere. *Id.* at 2.

[10] Because of Mrs. Barley's age (A. 21), employment was not a realistic goal. See Letter to Mr. Joseph Dougan from Mrs. Alice Cohen, dated June 30, 1967, which is attached to the complaint in the *Barley* case as Exhibit E and is part of the original record in this Court.

because of her failure to establish residence in Washington for one year immediately prior to her hospitalization in April 1941 (A. 22). An administrative appeal sustained the denial of her application on the ground that she failed to meet the one-year durational residence requirement (A. 22).[11]

3. *Gloria Jean Brown*

Before moving to the District of Columbia in February 1966, appellee Brown lived in a public housing project with her mother and two of her three children in Fort Smith, Arkansas (A. 35). When her mother moved to Oklahoma to obtain employment, she was informed that she was ineligible for public housing because she was a minor (A. 35). Having no place to live, she decided to move to Washington where she had resided as a young girl and where her oldest child had been living since 1962 with her father (A. 35).[12]

[11] In addition to the durational residence statute, appellee Barley challenged the constitutionality of District of Columbia Department of Public Welfare Handbook of Public Assistance Policies and Procedures, HPA II, Section EL 9.1, III, B, 3, which provided that time spent in an institution as a public charge during the first year a person lives in the District of Columbia does not count toward meeting the District's one-year durational residence requirement. In its opinion and decree, the court below ruled this regulation invalid (A. 70, 88).

[12] In an Affidavit in Support of Motion for Preliminary Injunction, which is part of the original record in this Court, appellee Brown stated:

> I came to Washington not only because my home in Arkansas had been broken and my son was living here, but also because I consider Washington my home. My parents moved to Washington when I was an infant. I attended Cleveland School through the third grade, from 1950 to 1954. From 1955 to 1957 I attended Bundy, Monroe and Lovejoy Schools in Washington. I lived in Fort Smith with my mother during the 1954-55 school year and from 1957 until 1962. In 1962, I returned

Appellee Brown arrived in Washington in February 1966, having left her two daughters in the temporary care of her grandmother in Fort Smith (A. 35). In August 1966, the daughters rejoined their mother in Washington (A. 35). In November of that year, shortly before the birth of her fourth child, she applied for public assistance but was told that she and her children were ineligible because they had not lived in Washington for one year (A. 35).[13] She reapplied for assistance for herself and her oldest child and was accepted for AFDC in February 1967 (A. 35-36). She was told, however, that her two older daughters would not be eligible for assistance until August 1967, and that her newborn child would not be eligible until his first birthday in November 1967 (A. 36).[14] In June 1967, she submitted a formal application for public assistance on behalf of her three youngest children and was informed that they were ineligible for failure to satisfy the durational residence requirement (A. 36).

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to my father's family and began tenth grade at Roosevelt, in Washington. In addition to my father and son, I have four sisters, two brothers, six aunts, seven uncles, and a grandmother in Washington. *Id.* at 2.

[13] According to her Affidavit in Support of Motion for Preliminary Injunction, a Welfare Department official "suggested placing the children in Junior Village, but I told him I did not want to do that because I did not want to become separated from my family." *Id.* at 3. Junior Village is the District's institution for dependent and neglected children.

[14] Pursuant to D.C. Code, §3-203(b), a child born in the District of Columbia must satisfy the one-year durational residence requirement unless, at the time of his birth, his mother has lived in the District for at least one year. Thus, in the case of Mrs. Brown's youngest child, he would not be eligible for public assistance until his first birthday since his mother, at the time of his birth, had resided in Washington for only nine months.

4. Clay Mae Legrant

Appellee Legrant moved to the District of Columbia from South Carolina with her two children in March 1967, after the death of her mother (A. 45). She planned to live with her sister and expected that her brother, upon his discharge from the armed forces, would be returning to Washington where he lived before entering the Army (A. 45).[15] Being pregnant and in ill health, she was unable to obtain regular employment; consequently, she applied for public assistance in July 1967 (A. 45). She received a notice of ineligibility on the ground that she and her children did not satisfy the one-year durational residence law (A. 45).

Summary of Argument

I. This Court has ruled that legislative classifications in a statute must be reasonable in light of the statute's purposes. Furthermore, the statutory purpose itself must be a lawful one. Where these criteria are not satisfied, the statute conflicts with the Constitution's guarantee of equal protection of the laws.

Although the District of Columbia's public assistance durational residence law was enacted by the Congress, this fact should not preclude the Court from applying this equal protection test when judging its constitutionality. Al-

[15] Appellee Legrant had previously lived in Washington with her sister from November 1965, to August 1966, when she returned to South Carolina to care for her mother who had had a stroke. When her mother died in March 1967, her father moved in with her older brother and his eight children but there was insufficient space in the four-room house for her and her family. See appellee Legrant's Affidavit in Support of Motion for Preliminary Injunction, which is part of the original record in this Court, at 2.

though the Fifth Amendment, unlike the Fourteenth, contains no equal protection clause as such, the guarantee against depriving persons of life, liberty or property without due process of law includes the equal protection concepts separately stated in the Fourteenth Amendment. The Court has recognized that both equal protection and due process have a common core. The legislative history of Congressional debates shortly before and at the time of the adoption of the Fourteenth Amendment, as well as early state court decisions, reveal that the concept of equal protection of the laws has always been considered to be encompassed by the due process clause of the Fifth Amendment.

This construction of the due process clause is particularly sound when judging the constitutionality of a statute enacted by Congress in its capacity as the legislature for the District of Columbia. If the Court were to render unconstitutional, under the equal protection clause of the Fourteenth Amendment, a state law, it would be unthinkable that a similar law attacked under the Fifth Amendment would be sustained simply because it was enacted by Congress as the District of Columbia's legislature.

In judging whether a statute should be declared unconstitutional, the Court has developed two distinct sets of standards. When the law in question takes the form of an economic regulation, the Court has held that it may not be found invalid if any state of facts reasonably can be conceived that would justify it. But when the effect of a law is to impinge upon important individual liberties protected by the first eight Amendments and the Fourteenth, the Court insists that much closer scrutiny be given to the statute in question in order to insure that it bears a rea-

sonable relationship to the achievement of the governmental purpose asserted as its justification. The need for such close scrutiny is heightened where the persons subject to the legislation are composed essentially of minority groups who, because of factors such as race or poverty, do not have the normal opportunity to make their grievances known through the ordinary political processes.

The District's public assistance durational residence law affects fundamental freedoms of a group of persons characterized by its extreme poverty and its inaccessibility to the normal political processes. Denying public assistance to the appellees and the class which they represent is a threat to their very existence and may result in break-up of family units, sickness, malnutrition or death. Furthermore, the effect of denying a person public assistance solely because he has recently moved to the District of Columbia is to penalize his exercise of the constitutional rights of movement and association.

A law which has the effect of impinging on so many personal rights is the very type which, under the decisions of this Court, must be subjected to the strictest scrutiny when determining whether the classification in question should be upheld. Particularly should this be so in the instant case where the statutory classification involved has recently been examined by a number of federal courts which, with one exception, have ruled it unconstitutional.

Appellants defend the durational residence law on the ground that it is reasonably related to the accomplishment of several purposes. First, appellants argue that the law is required to prevent migration to the District of Columbia of paupers seeking higher welfare payments. Although

this purpose seems to accord with the historical reasons for such durational residence laws, it is both a legally impermissible justification and a factually unfounded one. This Court has ruled that barring paupers from a jurisdiction is not a lawful state purpose, whether or not an influx of such persons creates administrative or financial difficulties. In any event, the supposed facts which underlie this asserted purpose—that persons move from state to state in order to obtain higher welfare payments—have merely been asserted by appellants. All available evidence points to precisely the opposite conclusion and reveals that people move for reasons connected with job opportunity, association with family, and the like. Hence, this supposed purpose for the law is both legally impermissible and factually untrue.

Appellants further assert that the law serves the purpose of providing an objective test of residence for persons applying for public assistance. Although this purpose is not *per se* an unlawful one, it must be accomplished by means which do not unnecessarily inhibit or penalize the exercise of constitutional rights. The law in question, however, does not meet this test since it sweeps before it all persons who have lived in the state for less than one year without regard to the true nature of their residence. The facts of this case illustrate the overbreadth of the law as an objective test of residence since the undisputed evidence is that appellees severed all ties with other jurisdictions before moving to the District of Columbia and they intend to remain here permanently.

Finally, appellants suggest that no purpose at all need be offered to justify the classification in question since the statute confers a mere noncontractual benefit which does

not have to be given in the first place. But the Court has consistently rejected the notion that infringement of constitutional rights may be justified on such grounds. The fact that a government may decline to extend to its citizens the enjoyment of a particular set of benefits does not mean that it may attach unconstitutional conditions to the benefits that are given.

In summary, all of the purposes which, according to appellants, underlie and justify the one-year durational residence law are either unlawful *per se*, ones which must be accomplished by narrower means, or are factually untrue. Hence, none of them may be invoked to save the classification on the ground that it is reasonably related to the accomplishment of these purposes. Since no purpose remains to justify the statute, it must fall as an arbitrary classification proscribed by the due process clause of the Fifth Amendment.

II. Appellants contend that an affirmance of the decision below will undermine the validity of durational residence requirements in other areas of the law. No such result follows, however, because public assistance durational residence statutes are fundamentally different from such requirements in other areas.

States commonly have durational residence requirements in four major areas not relating to public assistance—voting, public office, divorce and licensing. Requirements in these first two areas are frequently justified on the ground that the state has a valid interest in making certain that voters and elected officials are familiar with the issues. Durational residence requirements in divorce laws are upheld on the grounds that they insure that defendants receive adequate

notice and that they protect society against hastily brought suits, thereby helping to preserve family stability. Such requirements in the licensing area, although frequently struck down, may be justified because of the strong interest of the state in upholding standards of professional persons and others who offer their services to the general public.

The reasons discussed by the courts in justifying durational residence tests in other areas demonstrate the uniqueness of such provisions in public assistance laws. As already discussed, the statute in question is justified only by reference to objectives which are unlawful or factually unsupportable. Furthermore, durational tests in welfare have far more disastrous consequences to those whom they affect than do such provisions in other areas. In addition, durational residence tests in welfare flaunt the primary purpose of the overall statutory program of which they are a part, namely giving assistance to the needy. Durational tests in other areas, however, are usually consistent with and help promote the result sought by related statutory provisions. Finally, public assistance durational residence tests are unique with respect to the extent of the federal government's involvement in programs of which they are a part. Under such circumstances, a state's interest in protecting its durational residence statute is much less.

Because of the special features of durational residence laws in welfare, particularly concerning their purposes and the severity of their impact, decisions concerning their validity will have little, if any, relevance in determining the validity of other types of durational residence laws.

ARGUMENT

I.

The Provisions of D.C. Code, §3-203 Which Preclude the Awarding of Public Assistance to Persons Who Have Not Resided in the District of Columbia for One Year Immediately Preceding the Date of Filing an Application for Assistance Violate the Equal Protection of the Laws Guaranteed by the Due Process Clause of the Fifth Amendment.

A. The Requirements of Equal Protection

It is axiomatic that a law "which affects the activities of some groups differently from the way in which it affects the activities of other groups" is not necessarily proscribed by the requirements of equal protection. *Kotch* v. *Board of River Port Pilot Comm'rs*, 330 U.S. 552, 556 (1947). The Court long ago set forth the test for judging equal protection violations in legislative classifications when it stated that classification

> must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U.S. 150, 155 (1897).

This test, which the Court has reiterated on countless occasions,[16] was more simply put in *McLaughlin* v. *Florida*, 379 U.S. 184, 191 (1964):

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[16] *See, e.g., Southern Ry.* v. *Greene*, 216 U.S. 400, 417 (1910); *Atchison & Santa Fe Ry.* v. *Vosburg*, 238 U.S. 56, 59 (1915); *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920); *Truax*

> The courts must . . . determine the question whether the classifications drawn in a statute are reasonable in light of its purpose. . . .

See also *Carrington* v. *Rash*, 380 U.S. 89, 93 (1965).[17] The Court has further pointed out that one basis for judging the reasonableness of the classification is whether it "implies action consistent with the legitimate interests of the State. . . ." *Truax* v. *Raich*, 239 U.S. 33, 42 (1915). A statutory classification not reasonably related to a proper governmental objective will not survive the constitutional test. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).[18]

The fact that the statute here in question is an Act of Congress rather than a state law should not preclude the application to this case of the equal protection test just outlined. It is literally true, of course, that the Fifth Amendment, "unlike the Fourteenth, has no equal protec-

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v. *Corrigan*, 257 U.S. 312, 337 (1921); *Air Way Corp.* v. *Day*, 266 U.S. 71, 85 (1924); *Power Mfg. Co.* v. *Saunders*, 274 U.S. 490, 493 (1927); *Louisville Gas Co.* v. *Coleman*, 277 U.S. 32, 37 (1928); *Ohio Oil Co.* v. *Conway*, 281 U.S. 146, 160 (1930); *Metropolitan Co.* v. *Brownell*, 294 U.S. 580, 583 (1935); *Hartford Co.* v. *Harrison*, 301 U.S. 459, 462 (1937); *Asbury Hosp.* v. *Cass County*, 326 U.S. 207, 214 (1945); *Morey* v. *Doud*, 354 U.S. 457, 465 (1957); *McLaughlin* v. *Florida*, 379 U.S. 184, 190 (1964); *Baxstrom* v. *Herold*, 383 U.S. 107, 111 (1966); *Rinaldi* v. *Yeager*, 384 U.S. 305, 309 (1966).

[17] The more restrictive view of equal protection, expressed in such opinions of the Court as *Pace* v. *Alabama*, 106 U.S. 583, 585 (1882) and *Powell* v. *Pennsylvania*, 127 U.S. 678, 687 (1888), that the constitutional provision is not offended so long as the statute treats equally all to whom it is applicable, was soon discarded. See *McLaughlin* v. *Florida*, *supra*, at 190.

[18] *See also* Note, *Discriminations against the Poor and the Fourteenth Amendment*, 81 *Harv. L. Rev.* 435, 437 (1968).

tion clause," *Currin* v. *Wallace*, 306 U.S. 1, 14 (1939).[19] But the Court, while acknowledging this fact in *Bolling* v. *Sharpe*, *supra*, emphasized that both equal protection and due process stem from "our American ideal of fairness." 347 U.S. at 499.[20] It concluded that, in view of its decision prohibiting states from maintaining racially segregated public schools,[21] "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." 347 U.S. at 500. *Cf. Hurd* v. *Hodge*, 334 U.S. 24 (1948).[22] Furthermore, in other cases, the Court

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[19] The Court has made similar statements in *LaBelle Iron Works* v. *United States*, 256 U.S. 377, 392 (1921); *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 584 (1937); *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 151 (1938); *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381, 401 (1940); *Helvering* v. *Lerner Stores Corp.*, 314 U.S. 463, 468 (1941); *Detroit Bank* v. *United States*, 317 U.S. 329, 337 (1942). *Cf. Brushaber* v. *Union Pac. R.R. Co.*, 240 U.S. 1, 24 (1916). But none of those decisions suggested that the statutory provision which the Court upheld against an attack under the Fifth Amendment would have fallen if the equal protection clause of the Fourteenth Amendment had been applicable. In each of the cases, the Fifth Amendment equal protection claim was raised in the context of alleged discriminatory taxation or regulation of business—areas in which the states, too, have traditionally been given "the utmost latitude under the Equal Protection Clause . . . in defining categories of classification." *Allied Stores* v. *Bowers*, 358 U.S. 522, 532 (1959) (Brennan, J., concurring); *see also Nashville, C. & S. L. Ry.* v. *Browning*, 310 U.S. 362, 370 (1940); *Tigner* v. *Texas*, 310 U.S. 141, 149 (1940). Thus, it is likely that if the statutes in question had been those of a state rather than the federal government, the Fourteenth Amendment equal protection argument would have been rejected as well. *See, e.g., Steward Mach. Co.* v. *Davis*, *supra*, at 584; *United States* v. *Carolene Prods. Co.*, *supra*, at 151. These cases, then, would not support the argument that equal protection claims against acts of Congress are governed by wholly different standards than similar claims against acts of states. *See also District of Columbia* v. *Brooke*, 214 U.S. 138, 150 (1909).

[20] *See Griswold* v. *Connecticut*, 381 U.S. 479, 517 (1965) (Black, J., dissenting).

[21] *See Brown* v. *Bd. of Educ.*, 347 U.S. 483 (1954).

[22] In *Hurd*, the Court had before it the constitutionality of judicial enforcement of racially restrictive covenants in the District

has applied equal protection standards in judging the constitutionality of classifications in federal laws. *United States* v. *Petrillo*, 332 U.S. 1, 8 (1947); *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964).[22]

The Congressional debates shortly before and at the time of adoption of the Fourteenth Amendment indicate that the concept of equal protection of the laws was considered to be already an integral part of the due process clause of the Fifth Amendment at the time the Fourteenth Amendment was being considered. Several years before the debates on the Amendment, Representative Bingham, "the Madison of the first section of the Fourteenth Amendment", *Adamson* v. *California*, 332 U.S. 46, 74 (1947) (Black, J., dissenting), in discussing the matter of slavery in the new states of the Union said:

> It must be apparent that the absolute equality of all, and the equal protection of each, are principles of our Constitution, which ought to be observed and enforced in the organization and admission of new States. The Constitution provides, as we have seen,

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of Columbia, an action which the Court had previously ruled would be violative of equal protection if taken by state courts. *See Shelley* v. *Kraemer*, 334 U.S. 1 (1948). The Court concluded:

> It is not consistent with the public policy in the United States to permit federal courts in the Nation's capital to exercise general equitable powers to compel action denied the state courts where such state action has been held to be violative of the guaranty of the equal protection of the laws. 334 U.S. at 35.

[22] The Court applied equal protection standards in these two cases, although, unlike *Bolling* v. *Sharpe*, *supra*, they did not involve distinctions based on race. *See also Pennsylvania R.R. Co.* v. *Day*, 360 U.S. 548, 554 (1959) (Black, J., dissenting); Harvith, *Federal Equal Protection and Welfare Assistance*, 31 *Albany L. Rev.* 210, 220-21 (1967).

> that *no person* shall be deprived of life, liberty, or property, without due process of law. It makes no distinction either on account of complexion or birth—it secures these rights to all persons within its exclusive jurisdiction. This is equality. *Cong. Globe,* 34th Cong., 3d Sess., App. 140 (1857).[24]

In the debates on the Amendment itself, Congressman Bingham's view is stated by others. Thus Representative John J. Farnsworth of Illinois, while discussing the equal protection provision, said:

> "Equal protection of the laws;" can there be any well-founded objection to this? Is not this the very foundation of a republican government? Is it not the undeniable right of every subject of the Government to receive "equal protection of the laws" with every other subject? How can he have and enjoy equal rights of "life, liberty, and the pursuit of happiness" without "equal protection of the laws?" This is so self-evident and just that no man whose soul is not too cramped and dwarfed to hold the smallest germ of justice can fail to see and appreciate it. *Cong. Globe,* 39th Cong., 1st Sess., 2539 (1866).[25]

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[24] In a number of opinions rendered before the adoption of the Fourteenth Amendment, state courts interpreted "due process of law" and "law of the land" provisions in the state constitutions (both of these terms convey the same meaning—*see Murray's Lessee* v. *Hoboken Land and Improvement Co.,* 59 U.S. (18 How.) 272 (1856)) to include the guarantee of equal protection of the laws. *See e.g., Vanzant* v. *Waddell,* 2 Yerg. 260 (Tenn. 1826); *State Bank* v. *Cooper,* 2 Yerg. 599 (Tenn. 1831); *Reed* v. *Wright,* 2 Greene 15 (Iowa 1849); *Sears* v. *Cottrell,* 5 Mich. 251 (1858); *Holden* v. *James,* 11 Mass. 396 (1814).

[25] *See also* the statements by Senator Poland of Vermont, *Cong. Globe,* 39th Cong., 1st Sess., p. 2961 (1866); Representative Higby

In light of these cases and legislative history, the court below correctly ruled that "[d]enial of equal protection offends the Due Process Clause of the Fifth Amendment, applicable to this jurisdiction, as well as the Equal Protection Clause of the Fourteenth, applicable in terms to the States" (A. 61). This construction of the Fifth Amendment is especially sound in cases, such as the instant one, where a challenge is made to a statute enacted by Congress in its capacity as the District of Columbia's local legislature. As the Court of Appeals for the District of Columbia Circuit noted in *Hamilton National Bank of Washington* v. *District of Columbia*, 176 F.2d 624, 630 (C.A.D.C. 1949):

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of California, *Cong. Globe*, 39th Cong., 1st Sess., 1054 (1866); Representative Stevens of Pennsylvania, *Cong. Globe*, 39th Cong., 1st Sess., 2459 (1866); Representative Bingham, *Cong. Globe*, 39th Cong., 1st Sess., 1094 (1866).

The fact that the drafters of the Fourteenth Amendment referred separately in the same section to depriving persons of life, liberty or property without due process and denying them equal protection, does not demonstrate that the two clauses must have different meanings. A similar argument, adopted by the Court in *Hurtado* v. *California*, 110 U.S. 516, 534-35 (1884), contended that, since the Fifth Amendment contains both a due process provision and a requirement for grand jury procedure, canons of construction require that the former provision be read not to include the latter so that no part of the amendment be superfluous. Hence the Court concluded that since the grand jury provision was not part of Fifth Amendment due process, it could not be a part of Fourteenth Amendment due process and, therefore, had no application to state criminal proceedings. This construction argument has since been discredited. *See Powell* v. *Alabama*, 287 U.S. 45, 65-67 (1932); *Gideon* v. *Wainwright*, 372 U.S. 335, 341 (1963); *Chicago, Burlington & Quincy R.R. Co.* v. *Chicago*, 166 U.S. 226, 241 (1897); *Malloy* v. *Hogan*, 378 U.S. 1, 6 (1964). The latter two cases hold that the just compensation and the self-incrimination provisions of the Fifth Amendment apply to the states through the due process clause of the Fourteenth. *See also Cichos* v. *Indiana*, 385 U.S. 76 (1966). *And see* Mott, *Due Process of Law* (Bobbs-Merrill Co. 1926) 276.

> [I]t is true, and ought to be true, that "The Fifth Amendment as applied to the District of Columbia implies equal protection of the laws." *Sims* v. *Rives*, 1936, 66 App. D.C. 24, 84 F.2d 871, 878; *Lappin* v. *District of Columbia*, 1903, 22 App. D.C. 68. We say this is true because this court so held in the two cases just cited. We say it ought to be true because the due process of the Fifth Amendment should include or imply for the inhabitants of the District of Columbia equal protection of the laws enacted by Congress as the local legislature of the District. It is unthinkable that Congress, enacting statutes applicable only in this jurisdiction, does not violate the due process clause of the Fifth Amendment if it denies the people of this District equal protection of the laws, just as a state legislature violates the "equal protection" clause of the Fourteenth Amendment if it does the same thing.[26]

The law here in question imposes a durational residence test on welfare recipients in the District of Columbia in the same fashion that such test is imposed by most of the states. If the Court were to render unconstitutional such statutes when passed by state legislatures,[27] it surely "would

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[26] In a case decided only two months ago, *Bolton* v. *Harris*, —— F.2d —— (C.A.D.C. 1968), appellant challenged the mandatory commitment provisions of D.C. Code, §24-301(d) and the release provisions of D.C. Code, §24-301(e) on the ground that they violated equal protection by not affording safeguards available for persons civilly committed. Although construing the provisions to include these safeguards to save them against constitutional attack, Chief Judge Bazelon, speaking for a unanimous court, initially noted: "The equal protection guarantee applies to the federal government through the Fifth Amendment." —— F.2d —— n. 3. *Accord Dixon* v. *District of Columbia*, —— F.2d —— n. 3 (C.A. D.C. 1968).

[27] The constitutionality of state durational residence laws in public assistance programs is squarely before the Court in the two cases

be unthinkable that the same Constitution would impose a lesser duty on the federal government." *Bolling* v. *Sharpe*, *supra*, at 500.[28]

B. The Applicable Standards for Judging Equal Protection Violations.

Before applying the test of equal protection to the facts of this case, it is imperative to establish the relevant standards for judging constitutional violations. The Court has, from the beginning, emphasized the need for great restraint in declaring statutes unconstitutional. See *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 48, 72 (1810). Thus, the Court has emphasized that the burden of attacking a legislative act lies wholly "on him who denies its constitutionality." *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 266, 277 (1827). In its early decisions construing statutes challenged under

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to be argued with the instant one. See *Shapiro* v. *Thompson*, No. 813, Oct. Term, 1967, and *Reynolds* v. *Smith*, No. 1138, Oct. Term, 1967.

[28] Although it might be argued that it is not illogical that Congress, acting as the national legislature in our federal system, should not be limited in its courses of action in the same respects that the Constitution limits the states which play their particular and different roles, such an analysis should not be applied where the federal government exercises responsibilities as a state government. Assuming that there are sufficient differences between the concept of due process and the concept of equal protection to permit durational residence laws to be upheld under the former and invalidated under the latter, such a result would so "shock the conscience", *Rochin* v. *California*, 342 U.S. 165, 172 (1952), as to require invalidation under due process. The obvious unfairness of a constitutional rule which would make it illegal for a local government in Virginia to impose a durational residence test but make it legal for another local government across the river in the District of Columbia to impose such a test calls for the Court, as it did in *Bolling* v. *Sharpe*, *supra*, to find in the concepts of due process and equal protection enough common ground to avoid such a result.

equal protection and due process principles of the Fourteenth Amendment, the Court repeated this rule. See, e.g., *Munn* v. *Illinois*, 94 U.S. 113, 132 (1876). In *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911), the Court sought to distill the relevant rules by which equal protection arguments must be tested, noting, *inter alia*, that the person attacking the statutory classification "must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary" and that "if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed." 220 U.S. at 78-79.[29]

The Court has recognized, however, that not all constitutional challenges should be reviewed in precisely the same way. Thus, in *Board of Education* v. *Barnette*, 319 U.S. 624 (1943), involving the constitutionality of the public school flag salute requirement, the Court noted:

> The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions

[29] The latter of these two rules, which has been stated on innumerable occasions since, *see, e.g.*, *Rast* v. *Van Deman & Lewis Co.*, 240 U.S. 342, 357 (1916); *Crescent Cotton Oil Co.* v. *Mississippi*, 257 U.S. 129, 137 (1921); *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245, 255 (1922); *State Bd. of Tax Comm.* v. *Jackson*, 283 U.S. 527, 537 (1931); *Metropolitan Co.* v. *Brownell*, 294 U.S. 580, 584 (1935); *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 509 (1937); *United States* v. *Carolene Prods. Co.*, *supra*, at 154; *Asbury Hosp.* v. *Cass County*, *supra*, at 215; *Morey* v. *Doud*, *supra*, at 464; *Allied Stores* v. *Bowers*, 358 U.S. 522, 528 (1959); *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961), appears to have been first stated in *Munn* v. *Illinois*, *supra*, at 132. In *Munn* an equal protection challenge was made to an Illinois statute seeking to regulate public warehouses and the storage and inspection of grain. In the cases just cited which repeat the *Munn* language, all involve the matter of taxation or economic regulation.

> which the legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly and of worship may not be infringed on such slender grounds. 319 U.S. at 639.

Central to that case was a First Amendment right which, as Mr. Justice Frankfurter, concurring in *Kovacs* v. *Cooper*, 336 U.S. 77, 95 (1949), stated "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." Those cases, and many before and since, recognize that the freedoms of the First Amendment are of such importance that

> [w]hen it is shown that state action threatens significantly to impinge upon constitutionally protected freedom it becomes the duty of this Court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification. *Bates* v. *Little Rock*, 361 U.S. 516, 525 (1960).

See also *NAACP* v. *Alabama*, 357 U.S. 449 (1958); *see generally* McKay, *The Preference for Freedom*, 34 *N.Y.U.L. Rev.* 1182 (1959).

It is not only in the First Amendment area that the Court gives especially close scrutiny to claims of violations of constitutional rights. Thus, in *United States* v. *Carolene Prods. Co., supra*, the Court noted that

> [t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amend-

ments, which are deemed equally specific when held to be embraced within the Fourteenth. 304 U.S. at 152 n. 4.

Furthermore, the Court has taken the same approach in examining certain kinds of challenges based on equal protection.[30] Thus, in cases involving statutes imposing classifications based on race, the Court has refused to uphold them if their only justification is that they might "serve a rational purpose." *Loving* v. *Virginia,* 388 U.S. 1, 8 (1967). See also *McLaughlin* v. *Florida, supra.*

But the Court has not confined this approach merely to classifications based on race. In *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942), involving a law requiring the sterilization of "habitual criminals," but specifically exempting certain offenders such as embezzlers, the Court noted that because a basic liberty was involved, "strict scrutiny of the classification which a State makes in a sterilization law is essential . . . " to insure that no person is denied equal protection of the laws. 316 U.S. at 541. More recently, in *Harper* v. *Board of Elections,* 383 U.S. 663 (1966), the Court ruled unconstitutional Virginia's poll tax. Noting that "lines drawn on the basis of wealth or property . . . are traditionally disfavored," the Court stated:

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[30] It has only been in comparatively recent times that the equal protection clause has been used with frequency to vindicate individual civil rights. Its traditional use has concerned the imposition of limitations on the power of states to regulate economic matters. Thus, it is not surprising that, in the equal protection area, opinions of the Court emphasizing that special scrutiny will be given to statutory classifications impinging on important individual freedoms are of a relatively recent vintage. *See* Harris, *The Quest for Equality* (La. State Univ. 1960), in which the author studied 554 decisions of the Court in which the equal protection clause was invoked. He points out that 76.9% of them dealt with legislation affecting economic interests. *See id.* at 59.

> We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined. 383 U.S. at 668, 670.[21]

In summary, numerous decisions of the Court involving rights asserted both under the First Amendment and under the equal protection clause make it clear that when legislative classifications impinge upon important liberties, the Court will take an especially close look at the rights involved and require the state to do more than show that some state of facts might reasonably be conceived to justify the discrimination. In examining the nature of the discrimination in the instant case, it is important to keep in mind the individual rights involved and the effect the classification has on them.

The Court's insistence on careful scrutiny of statutes which impinge upon fundamental rights has been accompanied by a second approach to constitutional adjudication which, although more recent in development, is of great relevance to this case. In *Harper* v. *Board of Elections, supra,* the Court made special mention of the fact that "[l]ines drawn on the basis of wealth or property, like

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[21] *See also Griswold* v. *Connecticut*, 381 U.S. 479 (1965). There the Court struck down a Connecticut law prohibiting the use of any devices to prevent conception. Mr. Justice Goldberg, in a concurring opinion joined by the Chief Justice and Mr. Justice Brennan, noted:

> In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the states simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 381 U.S. at 497

And see 381 U.S. at 503 (White, J., concurring).

those of race . . . are traditionally disfavored." 383 U.S. at 668. The statute in *Harper*, by requiring the payment of a fee to vote, very directly placed a special burden on the poor. But whether or not the burden is placed directly or indirectly, the Court has examined with great care statutes and practices which tend to affect the poor more harshly than the rich.

Thus, in *Griffin* v. *Illinois*, 351 U.S. 12 (1956), the Court upheld petitioner's contention that the failure of the state to provide him, at no cost, a transcript of his criminal trial so that he might take an appeal, violated the provisions of the Fourteenth Amendment. This conclusion was reached despite the fact that no Illinois law placed any more restriction on petitioner in bringing his appeal than on any other potential appellant. Petitioner's difficulty lay in the fact that he was poor. Hence, a law which made no provision for giving him a free transcript burdened him in a very special way.[32] In a somewhat different setting, Mr. Justice White, concurring in *Griswold* v. *Connecticut, supra*, recently noted:

> The anti-use statute, together with the general aiding and abetting statute, prohibits doctors from affording advice to married persons on proper and effective methods of birth control. . . . And the clear effect of

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[32] The *Griffin* approach has been applied in a number of other criminal cases. *See e.g., Rinaldi* v. *Yeager*, 384 U.S. 305 (1966); *Douglas* v. *California*, 372 U.S. 353 (1963); *Lane* v. *Brown*, 372 U.S. 477 (1963); *Draper* v. *Washington*, 372 U.S. 487 (1963); *Smith* v. *Bennett*, 365 U.S. 708 (1961); *McCrary* v. *Indiana*, 364 U.S. 277 (1960); *Douglas* v. *Greene*, 363 U.S. 192 (1960); *Burns* v. *Ohio*, 360 U.S. 252 (1959); *Ross* v. *Schneckloth*, 357 U.S. 575 (1958); *Eskridge* v. *Board of Prison Terms & Paroles*, 357 U.S. 214 (1958).

> these statutes, as enforced, is to deny disadvantaged citizens of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control . . . . [A] statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendment. 381 U.S. at 503.[23]

The underlying approach of these cases was well stated in the recent decision involving segregation of the races in the District of Columbia school system. After noting that careful scrutiny is used to examine practices which particularly affect disadvantaged minorities, the court stated:

> The explanation for this additional scrutiny of practices which, although not directly discriminatory, nevertheless fall harshly on such groups relates to the judicial attitude toward legislative and administrative judgments. Judicial deference to these judgments is predicated in the confidence courts have that they are just resolutions of conflicting interests. This confidence is often misplaced when the vital interests of the poor and of racial minorities are involved. For these groups are not always assured of a full and fair hearing through the ordinary political processes, . . . because of the abiding danger that the power structure . . . may incline to pay little heed to even the deserving interests of a politically voiceless and invisible minority. These considerations impel a closer judicial sur-

[23] *See also Williams* v. *Shaffer*, 385 U.S. 1037 (1967) (Douglas, J., with whom the Chief Justice concurred, dissenting from the denial of certiorari).

veillance and review of administrative judgments adversely affecting racial minorities and the poor, than would otherwise be necessary. *Hobson* v. *Hansen*, 269 F.Supp. 401, 507-08 (D.D.C. 1967).[34]

As appellees demonstrate in Section I.C., *infra*, the durational residence law has the effect of placing even greater burdens on the already desperate economic plight of the persons who are affected by the law. In such circumstances, the Court should subject to closer scrutiny a law which "impinges on critical personal interests . . . ." *Snell* v. *Wyman*, —— F.Supp. —— (S.D.N.Y. 1968) (Kaufman, J., dissenting).[35]

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[34] The reference of the court in *Hobson* to the need for special scrutiny of practices which may not be examined through the ordinary political processes recalls the suggestion of this Court in *United States* v. *Carolene Prods. Co.*, *supra*, at 152, n. 4, that legislation which restricts the political process, thereby blocking the very method needed to repeal undesirable legislation, may be subject to more exacting judicial scrutiny than other kinds of legislation. The Court there had in mind restrictions on the right to vote, dissemination of information, interferences with political organizations and the like. But for persons in desperate economic straits, their power to repeal legislation which accentuates their difficulties may, as a practical matter, be as nonexistent as that of the group which finds that the political processes have been more formally restricted. In either case, the Court, recognizing the difficulty of bringing change through the normal operation of the legislative system, should subject the legislation in question to more exacting judicial scrutiny. *See also State Highway Dep't* v. *Barnwell Bros.*, 303 U.S. 177, 185, n. 2 (1938).

[35] In that case, the court had before it the constitutionality of New York laws and regulations which require welfare recipients to repay the costs of assistance benefits out of specified kinds of assets. Although the majority upheld the provision, it explicitly distinguished the recent cases involving public assistance durational residence requirements. Without implying any criticism of the result reached by the majority in that case, appellees suggest that the standard for judging equal protection violations which Circuit

C. The Nature of the Equal Protection Violation

D.C. Code, §3-203(a) establishes two classes of persons: those who have resided in the District of Columbia for at least one year and those who have resided here for less than one year.[36] The former group is eligible to be considered for public assistance and the latter group is not. To determine whether the court below applied correct standards in ruling that the classification was not reasonably related to a proper governmental objective,[37] it is necessary to examine whether the durational residence law impinges on fundamental personal freedoms of a disadvantaged and voiceless minority. As appellees will demonstrate, the statute has this very effect and hence the district court's approach, as well as its conclusions, was sound.

Judge Kaufman invoked in his dissent is the appropriate one to apply here.

[36] It is important to bear in mind that the statute is a *durational* residence requirement, not a requirement that a person be a resident.

[37] As noted earlier, see fn. 11, *supra*, the court below also ruled unconstitutional a Department of Public Welfare regulation which provided that time spent in an institution as a public charge during the first year a person lives in the District does not count toward meeting the durational residence requirement. *See* District of Columbia Handbook of Public Assistance Policies and Procedures, HPA II, EL 9.1, III, B, 3. As applied to appellee Barley, this regulation required that she must not only live in the District but prove her "mettle" by living on her own for eleven months (appellants count toward the one year requirement the month she lived in the District before entering the hospital—*see* A. 21) before she could receive assistance. Because she was without funds to support herself, enforcement of the regulation required her continued institutionalization. Such a subclassification of resident individuals which places additional restrictions on the payment of assistance to persons solely because they become dependent on state institutions during their first year in the District is without any rational justification and a manifest violation of the due process provision of the Fifth Amendment.

1. *The Effect of the Legislative Classification on the Appellees and the Class Which They Represent.*

a. The Right to Life

The central effect of the durational residence law is to threaten the most basic right of all, the right to life itself. Persons who apply for public assistance are, by definition, in economically desperate straits. Those without any means of financial support who are denied public assistance are being denied money payments which are used to provide the very basic essentials for subsistence. At worst, denial of assistance may lead directly to malnutrition, sickness and death. In other cases the results may be hardly less serious, placing in the balance "all that makes life worth living." *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922). As the court below noted:

> The spread over a year's time of the evils which public assistance seeks to combat may mean that aid, when it becomes available, will be too late: Too late to prevent the separation of a family into foster homes or Junior Villages; too late to heal sickness due to malnutrition or exposure; too late to help a boy from succumbing to crime (A. 64).[38]

[38] The economic hardships created by the durational residence law are made even more severe by the method of its application. Under Department of Public Welfare regulations in effect until the decision of the court below, a child moving to the District to join his mother had to satisfy the one year residence requirement whether or not his mother had already lived here a year and was receiving public assistance for herself and her other children. Furthermore, a child who was absent from the District for more than one year, with certain narrow exceptions, lost his residence and had to reside here a full year again in order to regain eligibility for assistance even though his mother never left the District. *See* Department of Public Welfare Handbook of Public Assistance Policies and Procedures, HPA II, §§EL 9.1, I, C; EL 9.1, III, B, 5. As previously noted, see fn. 14, *supra*, an infant born in the District would

The tragic effect of this denial of assistance was recently recognized in the report of the President's National Advisory Commission on Civil Disorders. In discussing the "most tension-producing statutory requirements" in the American public welfare system, the Commission stated:

> Third, in most states, there is a residency requirement, generally averaging around a year, before a person is eligible to receive welfare. These state regulations were enacted to discourage persons from moving from one state to another to take advantage of higher welfare payments. In fact, they appear to have had little, if any, impact on migration and have frequently served to prevent those in greatest need—desperately poor families arriving in a strange city—from receiving the boost that might give them a fresh start. *Report of the National Advisory Commission on Civil Disorders* (Bantam Books, Inc., New York, N.Y., 1968) at 459-60.

This description is borne out in the instant case. Appellee Harrell and her three children, prior to the entry of the preliminary injunction by the court below, were forced to live with her brother, his wife, and their six children in a four-bedroom house. She had to rely completely on a private charitable organization for food, hardly a dependable long-term arrangement. She was faced with the decision of whether to accept the Welfare Department's invitation to give up her children to the District of Columbia's Junior Village.[39] The plights of appellees Brown and

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not be eligible for assistance until its first birthday if, at the time of birth, its mother has not resided in the District for one year. See D.C. Code, §3-203(b).

[39] *See* appellee Harrell's Affidavit in Support of Motion for Preliminary Injunction at 2-4. *See also* Letter to Laurens Silver from

Legrant were equally desperate.[40] When a legislative classification has the effect of placing such additional burdens on a class of persons characterized by its extreme poverty and a practical inability to escape from the problems which the classification creates, the Court gives close scrutiny and requires full justification before permitting such a result. *See Griswold* v. *Connecticut, supra; Harper* v. *Board of Elections, supra; United States* v. *Carolene Prods. Co., supra; Skinner* v. *Oklahoma, supra.*

b. Freedom of Movement

The durational residence law precludes the payment of public assistance to any person who, within the past one year, has moved to the District of Columbia from another

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Jane Berry, dated April 20, 1967, which is attached to the *Harrell* complaint as Exhibit A and is part of the original record in this Court.

[40] Appellee Brown, in her Affidavit in Support of Motion for Preliminary Injunction, stated:

> My situation has never seemed so desperate. We have no money for shoes, for clothing of any sort. What furniture we have was left behind by the former tenant of our apartment. I do not know from month to month how I will be able to purchase food stamps. *Id.* at 4-5.

Appellee Legrant's Affidavit in Support of Motion for Preliminary Injunction stated:

> Our living situation right now is desperate since we will be forced to leave the apartment on Second Street any day. The conditions have been especially bad there since all but one of the other apartments have been vacated and boarded up. The roof leaks into the living room and the bathroom and there are many rats and roaches; but I and my children have no other place to go. . . . I have no money and no source of support . . . . I am frightened about the welfare of my children; I am concerned because we do not know where we are going to live and because we do not have enough money for food. *Id.* at 2-3.

The fourth appellee, Vera Barley, was not in these desperate economic straits because of her residence in a mental hospital. But

jurisdiction without regard to whether or not he is a permanent resident of this jurisdiction.[41] The net result of the law is to deny a statutory benefit to a class solely for the reason that its members have recently moved from some part of the United States to the District of Columbia. Because of the movement, the penalty of automatic ineligibility for public assistance is imposed.

Freedom of movement is, of course, a constitutionally protected right. Although there have been differences as to its precise source, *see United States* v. *Guest*, 383 U.S. 745, 759 (1966), its existence is no longer in dispute. *See Crandall* v. *Nevada*, 73 U.S. (6 Wall.) 35 (1868); *Edwards* v. *California*, 314 U.S. 160 (1941); *Kent* v. *Dulles*, 357 U.S. 116 (1958); *Aptheker* v. *Secretary of State*, 378 U.S. 500

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although her situation was not the economically precarious one usually faced by the newcomer seeking welfare assistance, she nevertheless was forced to remain in a mental hospital contrary to the advice of her doctors (A. 21).

[41] As the court below noted, "it is not disputed that the plaintiffs are bona fide domiciliaries of the District . . . ." (A. 70). There is no question that appellees, after they arrived in the District of Columbia, met the legal requirements of residence for other purposes. *See Kristensen* v. *McGrath*, 179 F.2d 796 (C.A.D.C. 1949); *District of Columbia* v. *Fleming*, 217 F.2d 18 (C.A.D.C. 1954); *D'Elia & Marks Co.* v. *Lyon*, 31 A.2d 647 (Mun. App. D.C. 1943). *See also* the Department of Health, Education and Welfare's Handbook of Public Assistance Administration which provides that a person

> shall be considered [for public assistance eligibility purposes] to have his residence at the place where he is living, if he is found to be living there voluntarily and not for a temporary purpose, that is, with no intention of presently removing therefrom. An intent to return to a place of former residence at some indefinite time in the future cannot be construed as meaning that he does not have residence at the place where he is currently living. Pt. IV, §3620.

See also Pt. IV, §3651.

(1964); *Zemel* v. *Rusk*, 381 U.S. 1 (1965). In *Aptheker*, the Court indicated that this freedom "is a constitutional liberty closely related to rights of free speech and association. . . . " 387 U.S. at 517.[42]

It is constitutionally irrelevant whether the durational residence law affects freedom of movement by directly barring the entry of a person or, as here, by imposing a penalty solely because the entry is made.[43] The imposition of a

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[42] In *Edwards* v. *California, supra,* Justice Jackson noted in a concurring opinion that the right of movement protected by the Constitution includes not only temporary travel but movement "for the establishment of permanent residence therein and for gaining resultant citizenship thereof." 314 U.S. at 183. It was movement for the purpose of settling in a new jurisdiction that appellees here were exercising.

[43] Either approach is likely to have the same effect on the class which appellees represent. A poor person who travels to Washington for the purpose of settling there cannot live without food to eat and shelter over his head. The inevitable effect of a law which denies assistance, no matter how desperately needed, simply because of recent settlement, is to pressure the individual to return to the place from which he came. *See Truax* v. *Raich, supra,* where the Court struck down as violative of equal protection a law which made it a crime for any company or individual employing more than five workers to have a labor force made up of less than 80% native born citizens of the United States or qualified electors. The Court stated: "The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work." 239 U.S. at 42. *See also* Supplement to Brief for Appellee on Reargument in *Edwards* v. *California, supra,* at 59-60, 66, 70-71, 74-75, 78, 81 & 83-84, which indicated that the usual method for enforcing the California law making it a criminal offense to assist a pauper to enter the state was to agree to suspend sentence on condition that the defendant would bring about the pauper's removal from the state. *Cf.* District of Columbia Department of Public Welfare, Handbook of Public Assistance Policies and Procedures, HPA II, AP 4.3, which details the procedure for transporting indigents out of the District and back to the state from which they came.

penalty on those who exercise a constitutional right may be no more permissible than to forbid a person to exercise the right in the first place. *See Harman* v. *Forssenius,* 380 U.S. 528, 540 (1965); *Sherbert* v. *Verner,* 374 U.S. 398, 406 (1963); *United States* v. *Jackson,* —— U.S. ——, 36 U.S.L. Week 4277 (1968). The Constitution protects against "sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson,* 307 U.S. 268, 275 (1939). Assuming that a penalty which is imposed on a class[44] because its members have exercised the right of movement is not *per se* unconstitutional, see *Zemel* v. *Rusk, supra,* at 14-16,[45] when the court judges the constitutionality of a law which necessarily has this effect, it should closely scrutinize such a classification and require that it be justified by substantial reasons.

c. The Right of Association

In addition to imposing a penalty on the exercise of freedom of movement, the durational residence law penalizes many persons who have exercised another fundamental freedom, the right of association. *See NAACP* v. *Alabama,* 357 U.S. 449 (1958); *Bates* v. *Little Rock, supra; Shelton*

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[44] That the classification in question here penalizes by denying a statutory benefit as opposed to a constitutional right does not make it any the less a penalty. *See Sherbert* v. *Verner, supra,* at 406. *See* section I.D.2.c., *infra.*

[45] The fact that the penalty of ineligibility for public assistance is imposed solely for the reason that appellees exercised the constitutional right of movement suggests that the classification might be unconstitutional, not only because it is unreasonably related to the statute's purposes, *see* section I.D., *infra,* but because the classification is *per se* unconstitutional. *See McLaughlin* v. *Florida, supra,* at 198 (Stewart, J., concurring).

v. *Tucker*, 364 U.S. 479 (1960); *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U.S. 293 (1961); *NAACP* v. *Button*, 371 U.S. 415 (1963); *NAACP* v. *Alabama*, 377 U.S. 288 (1964); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *Griswold* v. *Connecticut*, *supra*; *DeGregory* v. *Attorney General*, 383 U.S. 825 (1966); *Roberts* v. *Clement*, 252 F.Supp. 835, 848 (E.D. Tenn. 1966) (Darr, J., concurring). The relevance of the right of association to the durational residence law is particularly striking here. The desire to associate with family was a major reason for the decision of appellees Harrell and Brown to come to Washington.[46] Although the right of association which the Court has protected has taken many forms, none should be more worth protecting than the right of a person to associate with his family.[47] Like freedom of movement, a classification which has the effect of penalizing persons[48] because they have sought to enjoy the right of association may indeed be valid where the interest of the state is sufficiently compelling. But where such a right is necessarily involved, the state must do more than rest on the mere assertion that the classification is not patently arbitrary.

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[46] *See* fns. 7 and 12, *supra*.

[47] This fact is emphasized at the conclusion of the Court's opinion in *Griswold* v. *Connecticut*, *supra*: "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." 381 U.S. at 486.

[48] The persons penalized are not only the parents, but the children who, as in the case of Mrs. Harrell, were brought to Washington so that they could be close to the homes of their aunt and uncle who could help care for them. *See* fn. 7, *supra*.

2. *The Court Below Applied Correct Standards in Ruling That the Durational Residence Statute Violates Equal Protection.*

In ruling the durational residence law unconstitutional, the court below correctly recognized that

> the human terms of the problem permit the court somewhat greater latitude in deciding that this difference in the treatment of those in our midst who are in need amounts to unequal protection of the laws than if treatment were with respect to some matter less critical to their living conditions (A. 71).[49]

The foregoing analysis of the effect the durational residence law has on basic rights of the persons who come within its

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[49] Appellants find this reasoning to be the "basic flaw" in the court's opinion because "it ignores the constitutional standards applicable to benefit legislation and applies instead those applicable in cases which involve preferred freedoms." Brief for Appellants at 7. Appellants point to the court's reliance on *Sherbert* v. *Verner*, *supra*, as illustrative of its erroneous approach since *Sherbert*, unlike the instant case, according to appellants, involved the preferred rights of the First Amendment. With due respect to appellants' analysis, appellees suggest that it contains three basic flaws. First, it views incorrectly the facts of this case for, as indicated above, a number of fundamental rights are indeed involved here. Secondly, it views incorrectly the facts in *Sherbert*. Appellants imply that the unemployment insurance benefits in *Sherbert* were really not benefits at all since they were drawn from a fund to which the appellant (employee) in that case had contributed. On the contrary, South Carolina statutes provide that contributions to the unemployment insurance fund are made by the employer who is prohibited from deducting funds for this purpose from the employee's wages. *See* South Carolina Code, §§68-171; 68-201; 68-351; *Lumber Mut. Cas. Ins. Co.* v. *Stukes*, 164 F.2d 571 (C.A. 4, 1947). Thirdly, it views the law erroneously since *Sherbert* very definitely settled the question that a statute may not "be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellants' 'right' but merely a 'privilege.'" 374 U.S. at 404. *See* Section I.D.2.c., *infra*.

ambit clearly demonstrates that the court below was correct in requiring a compelling justification by the appellants to sustain the classification. Particularly should this be so in light of the nearly unanimous view of the courts that have recently considered the constitutionality of such requirements.[50] In addition to the decisions in *Thompson* v. *Shapiro*, 270 F.Supp. 331 (D. Conn. 1967) and *Smith* v. *Reynolds*, 277 F.Supp. 65 (E.D. Pa. 1967) which are now before the Court (Nos. 813 and 1138, Oct. Term, 1967), three-judge district courts have declared such laws unconstitutional in Delaware (*Green* v. *Department of Public Welfare*, 270 F.Supp. 173 (D. Del. 1967)) and Illinois (*Johnson* v. *Robinson*, —— F.Supp. —— (N.D. Ill. 1968)).[51]

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[50] In their Brief at p. 4, appellants note that "[u]ntil recently, the constitutionality of such provisions was seldom challenged, and such challenges as were made were uniformly rejected." The one case to which appellants refer, *People ex rel. Heydenreich* v. *Lyons*, 374 Ill. 557, 30 N.E. 2d 46 (1940), was indeed the *only* opinion of a court considering the constitutionality of welfare residence laws until the district court ruled in *Thompson* v. *Shapiro*, *supra*. This fact is not surprising in light of the general unavailability, until very recently, of lawyers to represent poor persons in civil litigation. *See Williams* v. *Shaffer*, *supra*, at 1041; *Snell* v. *Wyman*, *supra*, at n. 14. Although the *Lyons* case did sustain a durational residence requirement, appellees suggest that its two major foundations— 1) that since assistance is not a constitutional right, the state has a large degree of discretion when it elects to furnish it and 2) that the law represented a legitimate attempt to prevent Illinois from becoming a haven for the transient poor—have been completely eroded by more recent decisions of this Court. *See* section I.D., *infra*.

[51] *See also Smith* v. *King*, 277 F.Supp. 31 (M.D. Ala. 1967), now before this Court (No. 949, Oct. Term, 1967), where the court ruled that an Alabama welfare regulation which declared ineligible for AFDC those children whose mothers were engaging in nonmarital sexual relations was an arbitrary classification violative of equal protection. *And see* the decision just rendered in *Anderson* v. *Schaefer*, —— F.Supp. —— (N.D. Ga. 1968) in which a three-judge district court ruled unconstitutional under the equal protection clause that portion of a Georgia welfare regulation

In addition, preliminary injunctions enjoining statewide enforcement of durational residence laws have been granted in Wisconsin (*Ramos* v. *Health & Social Serv. Bd.*, 276 F.Supp. 474 (E.D. Wisc. 1967)),[52] Connecticut (*Alvarado* v. *Dunn*, Civil No. 12,399 (D. Conn. 1968)),[53] Maryland (*Mantell* v. *Dandridge*, Civil Action No. 18792 (D. Md. 1967)), and California (*Burns* v. *Montgomery*, Case No. 49018 (N.D. Cal. 1968)).[54]

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which provided that persons who obtain full-time employment are not eligible to have their wages supplemented by AFDC payments regardless of the amount of the wages whereas persons having part-time or irregular employment may have their wages supplemented by AFDC payments.

[52] Although the court has not entered a final order, in connection with the granting of the preliminary injunction, it wrote an opinion which stated that since the main issue was one of law, the decision on the preliminary injunction tended to be one on the merits and that a trial would only be held if any party believed that there were issues of fact to be considered or further argument required.

[53] The district court's judgment in *Thompson* v. *Shapiro*, *supra*, applied only to the named plaintiff. *See* Appendix to Appellant's Brief in *Shapiro* v. *Thompson*, No. 813, Oct. Term, 1967, at 37a. The order in *Alvarado*, although entitled "Temporary Restraining Order", is to remain in effect "during the pendency of this action or until further order of the court." *Id.* at 2.

[54] In addition, preliminary relief for the named plaintiff has been entered in cases challenging welfare residence laws in Arizona (*Porter* v. *Graham*, *supra*. *See* fn. 4, *supra*), Wisconsin (*Denny* v. *Health & Social Serv. Bd.*, Civil Action No. 67-C-426 (E.D. Wisc. 1967)) (a challenge to a general assistance residence law not involved in the *Ramos* suit), South Carolina (*Charles* v. *Rivers*, CA/67-849 (D. S.C. 1968)) (entered with the consent of attorneys for defendants), and Texas (*Alvarez* v. *Hackney*, Civil Action No. 68-18-SA (W.D. Texas 1968)). In Florida and Massachusetts, requests for preliminary relief in actions challenging durational residence laws have been denied, the Massachusetts court basing its ruling on the fact that no showing of irreparable damage was made by the plaintiffs who were receiving general public assistance for which there is no residence requirement. *Lamont* v. *Roberts*, No. 67-1056-Civ-CA (S.D. Fla. 1968); *Hatcher* v. *Ott*, Civil Action

D. The Statutory Purposes Which Allegedly Justify the Classification

As appellees pointed out in section I.A., *supra*, a statutory classification, to be sustained, must be "reasonable in light of [the statute's] purpose . . . ." *McLaughlin* v. *Florida, supra.* Before examining the supposed purposes of the durational residence requirement, which, according to appellants, justify the classification which so many courts have recently condemned, it is essential first to examine the general question of the technique used to search for a purpose[55]

No. 68-212-G (D. Mass. 1968). (The Florida court did not explain the basis for its order.) The only decision on the merits upholding the constitutionality of a durational residence law is *Waggoner* v. *Rosenn*, —— F.Supp. —— (M.D. Pa. 1968). In that case, involving a challenge to the same law that is before this Court in *Reynolds* v. *Smith*, No. 1138, Oct. Term, 1967, the Court, after the entry of a permanent injunction in *Reynolds*, dismissed the complaint. The opinion in *Waggoner* was written by the dissenting judge in *Reynolds*.

[55] It is important to keep in mind not only the supposed purposes of the durational residence provision but the more fundamental purpose of the overall statute, of which the durational residence section is only a small part. For if the supposed purpose of the provision in question here runs headlong into the primary purpose of the entire statute, this fact itself is good reason to examine the secondary purpose with great care and to determine whether "[o]ther means to accomplish secondary purposes must be sought" (A. 69). As the court below noted, the "basic purpose [of the public assistance statute], simply stated, is to aid members of the community who are in need" (A. 69). The provision of the District of Columbia Public Assistance Act which establishes the five basic categorical assistance programs states that the Commissioners shall "provide for maximum cooperation with other agencies rendering services to maintain and strengthen family life and to help applicants for public assistance and recipients to attain self-support or self-care . . . ." D.C. Code, §3-202 (b)(1). The federal statute which authorizes contributions to local AFDC programs makes the same point. Thus 42 U.S.C. 601 provides:

> For the purpose of *encouraging the care of dependent children in their own homes* or in the homes of relatives by enabling

with which to justify a statutory classification. Although it has often been stated that a justifying purpose may be found in any state of facts which reasonably can be conceived, *see Munn* v. *Illinois, supra,*[55] the Court has placed

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each State to furnish financial assistance and rehabilitation and other services . . . to needy dependent children and the parents or relatives with whom they are living *to help maintain and strengthen family life* and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence *consistent with the maintenance of continuing parental care and protection* . . . . (emphasis added)

Furthermore, mothers were deemed expressly to be the best judges of their children's interests, for Congress provided in 42 U.S.C. 606(b) that assistance payments in the AFDC program be in the form of money payments, as distinguished from voucher or vendor payments. The Department of Health, Education and Welfare has interpreted the money payment provision of the Social Security Act as follows:

> The right carries with it the individual's freedom to manage his affairs; to decide what use of his assistance check will best serve his interests; and to make his purchases through the normal channels of exchange, enjoying the same rights and discharging the same responsibilities as do friends, neighbors, and other members of the community. . . . a recipient of assistance does not, because he is in need, lose his capacity to select how, when, and whether each of his needs is to be met. *Handbook of Public Assistance Administration,* Pt. IV, §5120.

See also Pt. IV, §§3401, 4223.1, for a more detailed elaboration on the basic purpose of the AFDC program.

Thus, viewed in the context of the primary objectives Congress articulated in establishing the categorical assistance programs, it becomes obvious that the durational residence requirement results in restraining the mother's full exercise of her judgment concerning the proper environment for her children and further that its necessary effect could be institutionalization of children who had accompanied their parents to a new place of residence.

[55] As pointed out in fn. 29, *supra,* this test was developed in the context of cases challenging the power of the government to tax or regulate economic arrangements of businesses. A very different proposition is before the Court here.

limits on the way in which the search for the purpose may be conducted. Thus, where statutes explicitly declare their purpose, there is "no room to conceive of any other purpose for their existence." *Allied Stores* v. *Bowers*, 358 U.S. 522, 530 (1959). Likewise, where the purposes of a law, not obvious on its face, are stated by its framers or the state's representatives who are defending it, again there is no room left to conceive of any other purpose it may serve. *Martin* v. *Walton*, 368 U.S. 25, 28 (1961) (Douglas, J., dissenting); *Rinaldi* v. *Yeager*, 384 U.S. 305, 310 (1966); *McLaughlin* v. *Florida*, *supra*, at 193; *Griswold* v. *Connecticut*, *supra*, at 505 (White, J., concurring). *See also Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 169-70 (1963).[37]

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[37] In *Flemming* v. *Nestor*, 363 U.S. 603 (1960) the Court upheld the constitutionality of a provision of the Social Security Act which provided that OASDI benefits should be terminated in cases of aliens who were deported under Section 241(a) of the Immigration and Nationality Act (8 U.S.C. 1251(a)) on any of the grounds specified in the Social Security Act provision. *See* 42 U.S.C. 402 (n). The rational justification for the statute which the Court found was that the nation's economy would be benefited by the increased overall purchasing power resulting from taxing productive elements of the economy to provide payment to the retired and disabled who, because of their limited resources, would spend a comparatively large percentage of their payment. This advantage, the Court concluded, would be lost as to payments made to persons residing abroad. An examination of the Government's brief in this Court indicates that no such purpose was suggested and it does not appear on the face of the statute. *See* Brief for the Appellant in *Flemming* v. *Nestor*, No. 54, Oct. Term, 1959 at 70-76, 80-81. Thus, *Flemming* appears to take an approach contrary to the cases cited in the text. Appellees suggest that at least in a case in which fundamental rights are in contest and in which the government specifies the purposes of the statute in question, it is appropriate for the Court to avoid postulating rationales offered neither by the statute, its legislative history, nor its defenders, especially since appellees would have no opportunity to demonstrate that the suggested purpose has no relevance or rests on a supposed state of facts which does not exist.

Since the durational residence law does not on its face state the rationale for the classification, it is necessary to turn to justifications suggested by the framers of the law and by its defenders.

1. *Purposes Suggested by the Legislative History.*

A durational residence requirement in connection with a dependent children program first appeared in 1926 when the Congress enacted a statute to provide assistance to mothers of needy children. *See* 44 Stat. 758, D.C. Code, §8-91 (1929 Ed.).[58] Neither the 1926 law nor its revised form enacted in 1944, *see* 58 Stat. 277, D.C. Code, §32-753 (1940 Ed., Supp. VII), contain any legislative history suggesting a purpose of an AFDC durational residence law. The durational residence provision of D.C. Code. §3-203 was enacted by Congress in 1962 as part of a general consolidation in one title of all statutory provisions on public assistance. Since durational residence provisions were not new to the D.C. Code, it is not surprising that no purpose was mentioned by its authors except to make the residence requirement in all public assistance programs uniform in length. *See S. Rep.* 844, 87th Cong., 1st Sess. (1961), quoted at A. 59.

But residence provisions long antedate the categorical assistance programs established pursuant to the Social Security Act. They have their roots in the settlement system of the Elizabethan poor laws which sought to remove paupers to the jurisdictions which had the responsibility

[58] The 1926 program preceded by nine years the federal AFDC plan enacted as part of the Social Security Act of 1935.

for supporting them.[59] It is safe to assume that this historic purpose is at the heart of the District's provision as well.[60]

2. *Purposes Suggested by Appellants.*

a. Preventing Migration of Paupers to the District of Columbia.

In the court below, appellants offered as a rational justification for the durational residence law, the need to protect the funds appropriated for welfare assistance from being drained by persons migrating to the District of Columbia for the purpose of obtaining higher welfare payments.[61] In more abbreviated fashion, appellants make the

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[59] The development of settlement laws is documented in Mandelker, *The Settlement Requirement in General Assistance I*, 1955 *Wash. U.L.Q.* 355; Mandelker, *The Settlement Requirement in General Assistance II*, 1956 *Wash. U.L.Q.* 21; Mandelker, *Exclusion and Removal Legislation*, 1956 *Wis. L. Rev.* 57. When the settlement system was incorporated into the laws of the American colonies, the purpose it served became twofold. Since there was no uniform law for poor relief in America as there had been in England, the settlement laws not only shifted the responsibility for caring for poor persons, but also prevented paupers from entering communities which were hostile to them. *See* Falk, *Settlement Laws—A Major Problem in Social Welfare* (American Association of Social Workers, New York, 1948).

[60] Although there is an absence of legislative history stating the purpose of the District's durational residence law, the traditional purpose of such laws was alluded to in the Congressional debates over the provisions of the Social Security Act imposing maximum periods of residence which the states could require as conditions for applying for public assistance and still remain eligible for federal matching payments in the categorical assistance programs. *See Hearings before the Committee on Ways and Means, House of Representatives*, 74th Cong., 1st Sess. on H.R. 4120, at 830; 79 *Cong. Rec.* 6062 (1935).

[61] *See Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction and in Support of Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment*, which is part of the original record in this Court, at 14-16.

same justification argument here. *See* Brief for Appellant at 9.[42] This suggested purpose fits well with the historical facts.[43] But for several reasons, it may not be invoked to save the statute.

First, as the court below emphasized (A. 66), this purpose merely restates the premise of the Elizabethan Poor Laws which enshrine the notion of settlement. But, as this Court has pointed out:

> the theory of the Elizabethan Poor Laws no longer fits the facts. Recent years, and particularly the past decade, have been marked by a growing recognition that in an industrial society the task of providing assistance to the needy has ceased to be local in character. *Edwards* v. *California, supra,* at 174-75.

In *Edwards,* California, too, was concerned about the huge influx of migrants into its territory. Nevertheless, the Court struck down a law expressly designed to curb the migration of paupers. In doing so, the Court noted:

> It is frequently the case that a State might gain a momentary respite from the pressures of events by the simple expedient of shutting its gates to the outside world. But, in the words of Mr. Justice Cardozo: "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long

[42] The dissenting opinion below stated that the "manifest purpose of the legislation is to prevent a particular State or District from becoming a Mecca for migrants from other states where relief payments are smaller" (A. 82).

[43] See the Mandelker articles cited in fn. 59, *supra.*

run prosperity and salvation are in union and not division." *Baldwin* v. *Seelig*, 294 U.S. 511, 523. 314 U.S. at 173-74.

Clearly then, *Edwards* establishes that the object of deterring indigents from migrating to the District of Columbia is an unlawful governmental objective and hence may not be invoked to justify the statute. *Bolling* v. *Sharpe*, *supra*, at 499-500; *Griffin* v. *County School Bd.*, 377 U.S. 218, 231 (1964); *Truax* v. *Raich*, *supra*, at 421. Compare *Toomer* v. *Witsell*, 334 U.S. 385 (1948).

Secondly, the interests of appellants in protecting the drain of welfare funds through the use of a durational residence test seems less than persuasive in light of three District of Columbia practices. Pursuant to the Department of Public Welfare Handbook of Public Assistance Policies and Procedures, HPA II, AP 4.5, I, assistance is granted to persons formerly residing in the District who have severed all ties with the jurisdiction and moved elsewhere. These payments are made until the individuals have satisfied any durational residence requirements imposed by the state to which they have migrated. Furthermore, in the case of appellee Barley, the cost to the District of maintaining her at St. Elizabeth's Hospital was in excess of $370 per month, compared with approximately $110 per month that she would have received in public assistance funds if she had been declared eligible and placed in a foster home.[44] Finally, although D. C. Code, §3-203(b) pre-

[44] *See* Letter to Mr. Joseph Dugan, from E. J. Brown, dated July 6, 1967, and Opinion of Charles Duncan, Corporation Counsel, dated Jan. 18, 1967. These documents are attached to the complaint in the *Barley* case as Exhibits G and H and are part of the original record in this Court.

cluded the granting of public assistance to one of appellee Brown's children until his first birthday since, at the time of his birth, his mother had not lived in the District one year (*see*, fn. 14, *supra*), appellants will nevertheless care for this child at an institution without regard to his mother's length of residence.[65] D. C. Code, §3-126(3). The cost to the District for institutional care far exceeds the cost in giving the parent public assistance for the child.[66] Yet appellants seek to justify durational residence on budgetary grounds although denying aid for a year may make it "[t]oo late to prevent the separation of a family into foster homes or Junior Villages" (A. 64).[67]

Thirdly, this supposed purpose depends on the validity of a state of facts which has been totally unproved by

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[65] Likewise, until such time as the children of appellees Harrell and Legrant satisfied the one year durational residence requirement, the District would have institutionalized them if necessary. *See* fn. 39, *supra*, and accompanying text.

[66] *A Report to the Subcommittee on the District of Columbia, Committee on Appropriations, U.S. Senate*, entitled "Review of Policies and Procedures Concerning Admissions to and Discharges From Junior Village," prepared by the Comptroller General of the United States, dated February 12, 1964 (printed in *Hearings before the Subcommittee on the District of Columbia, Committee on Appropriations*, U.S. Senate, on HR 10199, D.C. Appropriations Act for 1965, 88th Cong., 2d Sess., Vol. II, 1401 *et seq.*) stated that in 1964 the total cost of operating Junior Village was $2,777,000. The monthly average cost per child for 1964 was $250.80 (1403). This cost has not appreciably declined during the last four years. By contrast, the cost in AFDC payments to maintain a child with his parent, taking into account his pro rata share of the shelter allowance available for the whole family, would be no more than $50 per month. *See* District of Columbia Handbook of Public Assistance Policies and Procedures, HPA II, RQ 2.1.

[67] In the case of appellee Harrell, appellants refused to grant her public assistance and yet "told me I could give my children to Junior Village where the District of Columbia government would pay for their keep." *See* appellee Harrell's Affidavit in Support of Motion for Preliminary Injunction at 4.

appellants.[68] Thus, appellants have assumed that absence of a durational residence law would lead to an assault on the District's treasury by persons flooding the jurisdiction in order to obtain welfare funds. Not a shred of evidence to support this notion was introduced in the court below or has been suggested in appellants' brief here.

As the Court noted in *United States* v. *Carolene Prods. Co., supra*:

> Where the existence of a rational basis for the legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, . . . and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist. 304 U.S. at 153.

Surely the supposed state of facts offered by appellants may not be made the subject of judicial notice. Thus, it is appropriate for a court to inquire into the validity of the asserted hypothetical facts and determine whether there is "evidence to dispel them." *McGowan* v. *Maryland*, 366 U.S. 420, 427 (1961).[69]

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[68] The court below noted this fact in stating: "Another difficulty in accepting the protective assumption as giving constitutional support to the challenged provision, is the speculative character of the assumption from a factual standpoint" (A. 67).

[69] *See also Busey* v. *District of Columbia*, 138 F.2d 592 (C.A. D.C. 1943), where the court noted that when legislation appears on its face to effect fundamental freedoms and the law's validity

> depends upon the existence of facts which are not proved, their existence should not be presumed; at least when their existence is hardly more probable than improbable, and particularly when proof concerning them is more readily available to the government than to the citizen. The burden of proof in such a case should be upon those who deny that these freedoms are invaded. 138 F.2d at 595.

As the court below found (A. 67), the available evidence points in precisely the opposite direction of appellants' supposed facts.[10] Hence, they may not be relied on as

[10] Available studies concerning the reasons for movement by lower socio-economic strata, including one by the District of Columbia Department of Public Welfare, indicate that people do not move for purposes of obtaining higher public assistance payments. Rather they move for a complex of reasons, the most common relating to promises of employment and the presence of relatives in the state of in-migration. *See* Tilly, "Race and Migration to the American City", *The Metropolitan Enigma* (James Wilson, Ed.) (Chamber of Commerce of the U.S. 1967) 129-30. (This study was attached as Appendix I to *Memorandum in Support of Plaintiffs' Counter-Motion for Summary Judgment and Supplemental Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction and Prayer for Permanent Injunctive Relief*, and is part of the original record in this Court.) For a detailed listing of twenty-four "migration stimulating situations" *see* Bogue, D., "Internal Migration", *The Study of Population* (P. Hauser and O. D. Duncan, Ed.) (University of Chicago, 1959), 251; Bogue, D., *Population of the United States* (Glencoe, Illinois, Free Press, 1959), 416-418. For general observations tracing patterns of movement from the rural South by Negroes see Hauser, P., "Demographic Factors in the Integration of the Negro," *Federal Role in Urban Affairs, Hearings before the Subcommittee on Executive Reorganization of the Committee on Government Operations, U.S. Senate*, 89th Cong., 2d Sess., Pt. 14, 3000 (1966).

For similar conclusions concerning the reasons for interstate migration, *see* U.S. Department of Commerce, Area Redevelopment Administration, *The Geographic Mobility of Labor: A Summary Report* (September, 1964); U.S. Department of Commerce, Area Redevelopment Administration, *The Propensity to Move* (July, 1964); U.S. Department of Commerce, Area Redevelopment Administration, *Migration Into and Out of Depressed Areas* (September, 1964). *The Geographic Mobility of Labor* study was based on a scientifically selected sampling involving over 3000 interviews. This study revealed that 18% of all most recent moves were for the purpose of obtaining steadier work or moving because of unemployment, 17% were to obtain a better or higher paying job, 16% were due to transfers and reassignments, 12% were due to starting or leaving school or military service, and 22% were for family reasons. Of this last category,

> [m]ost of the moves were made to be closer to relatives, either out of a general desire to be near relatives, or because of health considerations, or a death in family . . . . The total number of

support for the proposition that the durational residence law is a valid classification because it prevents migration for purposes of obtaining public assistance."[11]

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moves increases with education, as previously shown, but the proportion of moves which are at least in part for family reasons falls from 39% for the poorly educated to 11% for the college graduates. *Id.* at 19-20.

Studies in individual states reach the same conclusions. In a study entitled *The Movement of Population and Public Welfare in New York State*, New York State Department of Social Welfare (1958), analyzing the state case load in 1957 with respect to recent arrivals in the state within the last year, it was concluded that (at 2)

> states with high residence requirements for public assistance and care get, not less, but more in-migration than New York State. Among the states showing the largest net civilian in-migration are California, Florida, Michigan, Ohio, Arizona, and Maryland, all of which have very high residence requirements. New York State, without residence requirements, shows only a small gain.

The study also concluded that, from facts available to the New York State Department of Social Welfare,

> public welfare residence laws neither attract nor deter people from moving to a specific State. Studies show that they move for employment, for better economic opportunities, for better educational opportunities for their children, for better living conditions, for a better climate, and to join relatives and friends. *Id.*

[11] This conclusion was confirmed in Kasius, "What Happens in a State Without Residence Requirements", in *Residence Laws: Road Blocks to Human Welfare* (1956) at 19-20; *State of New York, Moreland Commission on Welfare, Public Welfare in the State of New York* (1963) at 27-28; Falk, *Social Action on Settlement Laws*, 18 *Soc. Serv. Rev.* 288 (1944); Hyde, *The Trouble with Residence Laws*, 16 *Public Welfare*, 103, 105 (1958). *See also 1967 Report of the Committee on Labor and Public Welfare, U.S. Senate*, 90th Cong., 1st Sess.: *The Migratory Farm Labor Problem in the United States*, at 42-43. The Rhode Island experience is the same. *See* Leet, *Rhode Island Abolishes Settlement*, 18 *Soc. Serv. Rev.* 281 (1944), where the author states that "to date, the Division of Public Assistance [in Rhode Island] has been unable to locate a single individual who has moved into the state in order to secure assistance." *Id.* at 283. The Greenleigh Report on ADC in Cook County,

b. An Objective Test of Residence

As a second justification for the durational residence law, appellants suggest that in light of the "well-known problems" of determining whether a person is a resident, it

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Illinois' (*Facts, Fallacies, and Future* (Greenleigh Associates, 1960)) concluded that the 24,000 families receiving Cook County ADC were not newcomers: 90% had lived in the state for five years or more; 25% of the mothers and 75% of the children were born in Illinois. AFDC mothers from outside had come to take a job (18%), to be with their husbands (22%), or to join relatives (38%), not to obtain public assistance. Furthermore, only 100 of the 2400 migrant families had received public assistance in the state of origin during the five year period before they came.

Finally, it is most extraordinary that appellants have raised the spectre of an influx of indigents migrating into the District of Columbia, since an official study of the District of Columbia Department of Public Welfare, "Children in Need in the District of Columbia" (October, 1954), reprinted in *Problems of Hungry Children in the District of Columbia, Hearings before the Subcommittee on Public Health, Education, Welfare, and Safety of the Committee on the District of Columbia, U.S. Senate*, 85th Cong., 1st Sess. (1957) 515 concluded that "figures relating to place of birth and migration of mothers and children support the belief that few if any families either white or Negro, move into the District for the purpose of obtaining public assistance." *Id.* at 523. Of AFDC mothers on the rolls during January, 1952 only 2% had resided in the District for less than three years at the time of the study and all but 106, or 6.6%, had resided in the District for at least five years. *Id.* at 521. Further, it was concluded that

> [g]oing back to the first time each mother received either ADC or home care the record indicates that, of the 1822 mothers, 47 or 2.6% received assistance their second year in the District; 70 others or 3.8% in their third year; 77 or 4.2% in their fourth, and 82 or 4.5% in their fifth year. The total who received assistance in their first five years of District residence was 358, or 19.6%. *Id.* at 521.

[11] As the court below noted (A. 68), the facts of this case lend no support to the argument that persons migrate in order to obtain public assistance. If appellants are really concerned with the problem of transients entering the District for the purpose of claiming assistance, they should adopt means appropriate to this end. *See infra.*

is within the legislative discretion to enact an objective test that a person who has resided in the District for one year is a resident for the purposes of public assistance. (Brief for Appellant at 10.) The difficulty with this argument is that it places administrative convenience ahead of constitutional rights. Where, as here, fundamental rights are in the balance, a legitimate goal of determining whether a person is in fact a resident[72] must be achieved by means "narrowly drawn to prevent the supposed evil . . . ." *Cantwell* v. *Connecticut*, 310 U.S. 296, 307 (1940). For, as the Court stated in *Aptheker* v. *Secretary of State, supra*, "precision must be the touchstone of legislation so affecting basic freedoms . . . ." 378 U.S. at 514. Accord *NAACP* v. *Button, supra; Louisiana ex rel. Gremillion* v. *NAACP, supra; Shelton* v. *Tucker, supra; NAACP* v. *Alabama, supra*, 377 U.S. at 307; *Dombrowski* v. *Pfister, supra*, at 486; *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603-04 (1967).

The durational residence statute, however, sweeps before it all persons who have been in the District for less than a year without any effort to sort out those persons who are clearly residents. As the court in *Green* v. *Department of Public Welfare, supra*, stated:

> we think that the one year period is a constitutionally unreasonable test for determining the "intention" aspect of domicile, assuming such was its purpose. More accurate alternatives are available to ascertain an individual's true intentions without exacting the protracted waiting period with its dire economic and social

[72] Appellees do not contend and the court below did not rule that persons who are not *bona fide* residents of the District of Columbia must be paid public assistance (A. 70).

consequences to certain individuals living in the state. 270 F.Supp. at 177-78."

Although the durational residence law might well be an administrative convenience, the Court has ruled in an analogous situation that such an excuse will not save the statute. In *Harman* v. *Forssenius, supra,* the Court declared unconstitutional under the Twenty-Fourth Amendment a Virginia law which provided that in order to qualify to vote in a federal election, one must either pay a poll tax or file a witnessed or notarized certificate of residence. The state sought to justify the law on the ground that its certificate was a necessary method of proving residence of those persons who, by virtue of the Twenty-Fourth Amendment, could vote in a federal election in Virginia without paying the poll tax. But the Court ruled that this "remote administrative benefit," namely demonstrating residence, did not justify the constitutional deprivation involved. 380 U.S. at 542. See also *Carrington* v. *Rash, supra,* at 96; *Oyama* v. *California,* 332 U.S. 633, 646-47 (1948); *Rinaldi* v. *Yeager, supra,* at 310.

c. Public Assistance Is a Gratuity

Finally, appellants suggest as a general justification for the statutory scheme the fact that since public assistance payments are mere non-contractual benefits, they must

be viewed in light of the Court's pronouncement in *United States* v. *Cook,* 257 U.S. 523 (1922), that:

"... Congress in shaping the form of its bounty may impose conditions and limitations on its acquisition

[18] As noted in fn. 41, *supra,* appellees satisfy legal requirements of residence for all other purposes.

> and enjoyment by the beneficiaries *which it could not impose on the use and enjoyment by them of a vested right.*"

257 U.S. at 527 (emphasis added) (Brief for Appellants at 6-7).[74]

Whatever may have been the law at one time with respect to the right of government to justify infringement of constitutional rights on the ground that the infringement relates to a benefit which the government does not have to give in the first place, this view has long since been rejected. *Sherbert* v. *Verner, supra,* at 404; *Keyishian* v. *Board of Regents, supra,* at 605-06; *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 239 (1957); *Garrity* v. *New Jersey,* 385 U.S. 493 (1967); *Spevack* v. *Klein,* 385 U.S. 511 (1967); *Simmons* v. *United States,* 88 Sup. Ct. 967 (1968).[75] Any suggestion to the contrary in *Flemming* v. *Nestor, supra,*[76] *see* (A. 81) has been superseded by more recent decisions of the Court.[77]

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[74] This justification, rather than being suggestive of a purpose of the durational residence test, is rather one which argues that no purpose at all need be offered to justify a statutory classification relating to a benefit as opposed to a right.

[75] In the one case that has squarely considered the unconstitutional condition doctrine in the context of public assistance, the court rejected the notion that "the power of government to decline to extend to its citizens the enjoyment of a particular set of benefits . . . embrace[s] the supposedly 'lesser' power to condition the receipt of those benefits upon any and all terms." *Parrish* v. *Civil Serv. Comm.,* 425 P.2d 223, 230 (Sup. Ct. Cal., 1967). *See also Collins* v. *State Bd.,* 248 Iowa 369, 81 N.W. 2d 4 (1957).

[76] Appellants, both in the court below and here, have placed great reliance on *Flemming* v. *Nestor, supra.* Whether or not the standard set forth by the Court in *Flemming* for judging the constitutionality of conditions attached to a statutory grant has been super-

In summary, the various purposes for the classification revealed by the statute, its history, and the suggestions of appellants are either unlawful purposes *per se*, ones that

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seded by more recent cases, *Flemming* is clearly distinguishable. First, that case involved a discrimination between residents and non-residents, not one between two groups of residents, a classification which the Court has traditionally examined with close scrutiny. *See e.g., Truax* v. *Raich, supra; Oyama* v. *California, supra.* Secondly, *Flemming* involved a deported alien, not a citizen. The power of Congress to prescribe the means and circumstances under which aliens may be deported has traditionally been construed extremely broadly. *See Galvin* v. *Press*, 347 U.S. 522 (1954) and the cases cited therein. In its brief in *Flemming*, the Government placed great reliance on the fact that the statutory classification involved non-resident aliens. *See* Brief for Appellant in *Flemming* v. *Nestor*, No. 54, Oct. Term, 1959, at 45-53, 71-73. Thirdly, the rational justification offered in support of the statute's constitutionality simply has no application here. The Court in *Flemming* was concerned about a loss to the American economy because funds were spent in another country. Obviously, welfare payments made to appellees and the class they represent will be spent not only in this country but in all likelihood in the District of Columbia since persons poor enough to qualify for this aid are unable to save any substantial portion of it to spend at a later date in another jurisdiction.

[77] Appellants, in the court below, cited 42 U.S.C. 602(b) as lending support to the argument that a durational residence test is a reasonable condition. That section provides that the Secretary of Health, Education, and Welfare shall not approve any state plan which imposes as a condition of eligibility for AFDC a durational residence requirement of more than one year. *See also* 42 U.S.C. §§302(b), 1202(b), 1352(b) and 1382(b) which impose limitations on durational residence requirements for OAA, AB, and APTD. But, as the language of these provisions makes apparent, they express no ringing approval of durational residence tests. Their legislative history suggests that Congress, while desiring not to encroach unreasonably on the right of the states to set eligibility requirements for public assistance, nevertheless thought existing durational residence laws were excessive. The result of these two conflicting concepts was a compromise which permitted federal funds to be contributed to states with residence requirements but placed restrictions on the required length of residence. *See S. Rep.* 628, 74th Cong., 1st Sess. 4, 35 (1935); *Hearings before the Committee on Finance, U.S. Senate*, 74th Cong., 1st Sess., on S. 1130,

must be accomplished by narrower means, or are factually untrue. Hence none of them may be invoked to save the classification on the ground that it is reasonably related to the accomplishment of these purposes. Since there are no purposes remaining to justify the classification, it must fall as an arbitrary one prohibited by the equal protection guarantees of the Fifth Amendment.[78]

192, 633; *H. Rep.* 615, 74th Cong., 1st Sess. 23 (1935); *Hearings before the Committee on Ways and Means, House of Representatives,* 74th Cong., 1st Sess., on H.R. 4120, 830; 79 *Cong. Rec.* 5602 (1935). In light of the express language and history of these Social Security Act provisions, the statement of the dissenting opinion below that the District law "was expressly authorized by the Social Security Act" (A. 73) is hardly an accurate description. Therefore, the dissenting opinion's conclusion that a ruling that the District's provision is unconstitutional "strike[s] down in its wake . . . the Social Security Act authoriz[ation]" (A. 73) does not follow. Should the Court affirm, these Social Security Act provisions, while remaining on the books, will simply no longer be needed since the problem they sought to minimize will have been eliminated.

[78] Two other conceivable purposes for the classification, neither of them suggested by counsel for appellants, the statute, or its legislative history, are that 1) the statute tends to assure eligibility for benefits and thereby avoids payments tainted with fraud and 2) the statute, by not giving benefits until the second year of residence, enables the legislature to better predict the amount of funds needed for the following year's welfare budget. The first argument, which was rejected by the court in *Green* v. *Dept. of Public Welfare, supra,* at 177, was possibly a concern of the dissenting opinion in the court below. *See* A. 74. An identical argument was suggested to the court in *Sherbert* v. *Verner, supra.* In rejecting it, the court noted a) that the argument had not been made in the court below and "we are unwilling to assess the importance of an asserted state interest without the views of the state court." 374 U.S. at 407; b) even if the contention had been made below, the record would not have sustained it; and c) it is doubtful whether such evidence, even if it existed, would be sufficient to warrant substantial infringement of the constitutional rights involved for:

> [e]ven if the possibility of spurious claims did threaten to dilute the funds and disrupt the scheduling of work, it would

II.

The Durational Residence Requirements of D.C. Code, §3-203 Are Distinguishable From Durational Residence Requirements in Other Areas of the Law.

Appellants argue that an affirmance of the decision below will undermine the validity of durational residence requirements in all other areas of the law. *See* Brief for Appellants at 9-10.[79] An examination of the nature and purpose of these other types of durational residence requirements demonstrates, however, that no such result follows since those provisions are fundamentally different from the provisions involved here.

A. Other Types of Durational Residence Requirements.

Although varying substantially from state to state, most durational residence laws not relating to public assistance appear to fall into four general categories—voting, public office, divorce and licensing. Courts which have considered

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plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights. 374 U.S. at 407.

All three of these reasons apply here.

The second argument was offered by the dissenting judge in the lower court in *Smith* v. *Reynolds, supra,* as the " 'state of facts [which] reasonably may be conceived to justify' the challenged statutory discrimination. . . . " 277 F.Supp. at 71. As the appellees' brief in this Court in *Reynolds* makes clear (*see* section II. C. of the Brief for Appellees in No. 1138, Oct. Term, 1967), this suggested purpose was, *inter alia,* factually disproved in the trial court. In any event, it has never been suggested by appellants here.

[79] *See also* the dissenting opinion of Judge Clarie in *Thompson* v. *Shapiro, supra,* at 340, and the dissenting opinion of Judge Holtzoff in the instant case at A. 83.

the legality of such requirements in each of these areas have reached varying results, generally upholding them but occasionally declaring them invalid, especially in the licensing area. In reaching their results, the courts have recognized that all durational residence requirements are not similar and each type requires a different analysis.

States typically impose durational residence requirements for voting in both local and federal elections.[80] This Court recently reaffirmed the validity of such requirements in a *per curiam* opinion in *Drueding* v. *Devlin*, 380 U.S. 125 (1965). See also *Pope* v. *Williams*, 193 U.S. 621 (1904). They have been justified on the ground that the state has a legitimate interest in protecting the voting process from new residents who have no familiarity with the issues or the candidates, but who nonetheless may decisively affect the outcome of an election. *Wright* v. *Blue Mountain Hosp. Dist.*, 214 Ore. 141, 328 P.2d 314 (1958); *Estopinal* v. *Michel*, 121 La. 879, 46 So. 907 (1908); *Shaeffer* v. *Gilbert*, 73 Md. 66, 20 Atl. 434 (1890). Another purpose of these laws is to provide a means of identifying voters and protecting against fraud. *People ex rel. Agnew* v. *Graham*, 267 Ill. 426, 108 N.E. 699 (1915); *Howard* v. *Skinner*, 87 Md. 556, 40 Atl. 379 (1898); *Shaeffer* v. *Gilbert*, *supra*. Durational residence requirements for voting may further be justified on the ground that Article I of the Constitution gives the states "broad powers to determine the conditions under which the right of suffrage may be exercised . . . absent of course, that discrimination which the Constitution con-

[80] Pursuant to the authority of the Twenty-Third Amendment, the Congress has imposed a one year durational requirement upon residents of the District of Columbia who wish to vote for presidential and vice-presidential electors. D.C. Code, §1-1102.

demns." *Lassiter* v. *Northampton Election Bd.*, 360 U.S. 45, 50-51 (1959).

But even in the voting area, the power to impose durational residence provisions has its limits. Thus, in *Carrington* v. *Rash, supra,* the Court struck down a provision of the Texas Constitution which prohibited any member of the armed forces who moves his home to Texas during the course of his military duty from ever voting in any election in Texas so long as he is a member of the armed forces. The Court held that disenfranchisement of military persons, regardless of the length of their residence in the state, constituted an arbitrary discrimination against that group of residents. The lesson of *Carrington* is that even in an area where durational residence tests are normally upheld as reasonably related to legitimate state interests, there are limits beyond which the requirement will be stricken as an arbitrary classification.[81]

Closely related to the durational residence requirements for voting are those for holding elected or appointed public office.[82] Such requirements are found in provisions of Articles I and II of the Constitution listing qualifications

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[81] The type of discriminatory classification condemned in *Carrington* is very analogous to the one here. The Texas law made no attempt "to determine the bona fides of an individual claiming to have actually made his home in the State long enough to vote. . . . All servicemen not residents of Texas before induction came within the provision's sweep." 380 U.S. at 95-96. It was this lack of precision which brought about the statute's downfall. Appellants' attempt to defend the District's durational residence test by making essentially the same argument—that the provision is really an objective test of residence. But this argument contains the identical defect of the statute in *Carrington*, namely that it precludes *any* person residing here less than a year from demonstrating residence. *See* Section I.D. 2.b., *supra*.

[82] *E.g.* D.C. Code, §§11-2301 and 2-701, and §201(b) of the President's Reorganization Plan No. 3 of 1967.

for Representatives, Senators and the President. There are few court decisions directly considering the validity of such state requirements. See *People ex rel. Hoyne* v. *McCormick*, 261 Ill. 413, 103 N.E. 1053 (1913); *Sheehan* v. *Scott*, 145 Cal. 684, 79 Pac. 350 (1905); *Evansville* v. *State*, 118 Ind. 426, 21 N.E. 267 (1889). *State ex rel. Holt* v. *Denny*, 118 Ind. 449, 21 N.E. 274 (1889). The policy reasons for these requirements are similar to those in the voting area, namely that a person seeking or eligible for public office, even more than a voter, must have a close familiarity with the community and governmental unit within which he will exercise his power. *Sheehan* v. *Scott, supra*, 145 Cal. at 687, 79 Pac. at 351.

Virtually all of the states have durational residence requirements for obtaining divorces.[83] They have been upheld when attacked as violating provisions of the Fourteenth Amendment. *Hensley* v. *Hensley*, 286 Ky. 378, 151 S.W. 2d 69 (1941); *Worthington* v. *District Court*, 37 Nev. 212, 142 Pac. 230 (1914). The Courts have justified them on the grounds that they are necessary to insure that defendants receive adequate notice, *Roberts* v. *Roberts*, 144 Tex. 603, 192 S.W. 2d 774 (1946); to prevent nonresidents from using the state as a dumping ground for the marital troubles of other states, *Holman* v. *Holman*, 35 Tenn. App. 273, 244 S.W. 2d 618 (1951); and to protect the interest of society against hastily brought suits, *Roberts* v. *Roberts, supra; Aucutt* v. *Aucutt*, 122 Tex. 518, 62 S.W. 2d 77 (1933). Furthermore, social policy supports the imposition of durational residence requirements for obtaining divorces. Such

[83] *See* Am. Jur. 2d Desk Book Doc. No. 125 and Supp. In the District of Columbia, one of the parties to the marriage must have been a "bona fide resident" for the one year preceding the commencement of the action. D.C. Code, §16-902.

a requirement may promote the stability of families in the jurisdiction. As the Court below noted (A. 64), a durational residence requirement for obtaining public assistance payments may lead to precisely the opposite result by encouraging breakdown of existing family units.

Finally, residence in a jurisdiction for a certain period may be a condition for obtaining a license to engage in a profession or operate a particular type of business.[84] Such requirements have been invalidated by several courts under the privileges and immunities clause of Article IV, Section 2 and the due process and equal protection clauses of the Fourteenth Amendment. *Mercer* v. *Hemmings*, 194 So. 2d 579 (Fla. 1966), appeal dis. 389 U.S. 46 (1967); *New Brunswick* v. *Zimmerman*, 79 F. 2d 428 (C.A. 3, 1935); *Williams* v. *McCartan*, 212 Fed. 345 (W.D.N.Y. 1914); *State* v. *Pennoyer*, 65 N.H. 113, 18 Atl. 878 (1889); *In re Watson*, 15 Fed. 511 (D. Vt. 1882); *Wormsen* v. *Moss*, 177 Misc. 19, 29 N.Y. Supp. 2d 798 (1941).[85] But even in this area, there may be a basis for justifying durational residence requirements because of the strong interest of the state in upholding standards of professional persons and others who offer their services to the general public and who occupy special

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[84] *E.g.* D.C. Code, §2-915. (Requirement of one year's residence or employment in the District of Columbia to obtain a certificate as a public accountant.)

[85] In the *Wormsen* case, involving a New York City ordinance requiring that applicants for a license to operate massage parlors must have been United States citizens for two years, the court ruled (per Bernstein, J.):

> . . . it is clearly unreasonable and arbitrary to apply a test of qualification for a private calling on the basis that one has been a citizen for two years and another for but a year and eleven months. Such a test is a discriminatory one in that, as Judge Cardozo said, it "create[s] a privileged caste among the members of the state." *People* v. *Crane*, *supra*, 214 N.Y. at page 167 . . . 29 N.Y. Supp. 2d at 803.

positions of trust and confidence. See *La Tourette* v. *McMaster*, 248 U.S. 465 (1919); *State ex rel. Walker* v. *Green*, 112 Ind. 462, 14 N.E. 352 (1887). Compare *Dent* v. *West Virginia*, 129 U.S. 114 (1889); *Graves* v. *Minnesota*, 272 U.S. 425 (1926); *Schware* v. *Bd. of Bar Examiners*, *supra*; *Martin* v. *Walton*, *supra*.

B. The Uniqueness of Public Assistance Durational Residence Laws

The foregoing analysis reveals the striking contrast, in terms of purpose and effect, between durational residence laws in welfare and those in other areas. First, durational tests in these other areas are tailored to accomplish substantial state objectives such as assuring a more informed electorate or guaranteeing the integrity of the professional services which are offered to the public. However, as previously discussed, durational tests in welfare are essentially designed to accomplish the unlawful state objective of discouraging indigents from entering the state.

Secondly, durational tests in welfare have far more disastrous consequences to those whom they affect. A new arrival in the jurisdiction may be substantially inconvenienced by a law denying him the right to vote or run for office during his first year of residence. But the interest of the state in protecting the ballot may substantially outweigh that inconvenience. For a person in need of public assistance, however, far more than inconvenience is involved. At stake is life itself or the threat of family disintegration.[86] The urgent need, from both the individual

[86] In some instances, the impact of such a law may be to force a person to return to the jurisdiction which he had decided to leave. It is very unlikely that durational residence laws in other areas would have such an impact. *See* fn. 43, *supra*.

and the government's point of view, to avoid such consequences far outweighs any lawful state interest in denying aid for a year.

Thirdly, to the extent these other durational residence requirements have been upheld by the courts, they have usually been justified on the ground that they promote the same result as that sought by the related statutory provisions, *e.g.* the requirements for public office holders are likely to result in more competent and committed governmental officials. As noted earlier, however, the effect of the welfare durational residence requirement is to flaunt the primary purpose of the statutory program of which it is a part.[37] By preventing persons from receiving public assistance payments when they are in need, it promotes the very conditions which the overall assistance program is designed to alleviate.

Finally, welfare durational residence requirements are unique with respect to the extent of the national interest involved in the programs of which they are a part. Most of the requirements are found in those state public assistance programs which are substantially underwritten by federal program matching grants pursuant to the provisions of the Social Security Act. For example, in calendar 1966, of a total of $2,265,346,000 spent in AFDC programs in all the states, $1,299,940,000 or 57% came from the federal government. *Social Security Amendments of 1967, Hearings before the Committee on Finance, U.S. Senate,* 90th Cong., 1st Sess., on H.R. 12080, pt. 1, at 385. This large financial contribution is accompanied by detailed federal supervision over the various state programs. In such

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[37] *See* fn. 55, *supra.*

circumstances, the interest of an individual state in protecting welfare residence requirements is far less than it is with respect to residence requirements in areas of more traditional local concern. See *Edwards* v. *California, supra* at 174-75.[88]

It is clear, then, that public assistance durational requirements are unique in many respects, particularly concerning their purposes and the severity of their impact; thus, decisions concerning their validity will have little, if any, relevance in determining the validity of other types of durational residence laws.

[88] The court below recognized this fact when it noted that "[t]his national movement toward assistance where assistance is needed" permitted the court somewhat greater latitude in ruling that the statute in question violates the equal protection of the laws (A. 71).

Conclusion

For the foregoing reasons, it is respectfully requested that the judgment of the court below be affirmed.

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